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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-351

E. L. BOTELER, DIRECTOR, MISSISSIPPI STATE HIGHWAY DEPARTMENT,

Petitioner,

vs.

NATIONAL WILDLIFE FEDERATION and MISSISSIPPI WILDLIFE FEDERATION; WILLIAM T. COLEMAN, SECRETARY OF TRANSPORTATION; NORBERT T. TIEMANN, FEDERAL HIGHWAY ADMINISTRATOR; and EMERY L. SHAW, FEDERAL HIGHWAY ADMINISTRATION DIVISION ENGINEER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-mentioned cause.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 529 F.2d 359, a copy of which is attached hereto as Appendix A. The opinion of the United States District Court for the Southern District of Mississippi is reported at 400 F.Supp. 705 and a copy is attached hereto as Appendix B

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made final on June 11, 1976. This Court granted petitioner an extension of time in which to file this Petition for Writ of Certiorari until September 9, 1976. A copy of said order of extension is attached as Appendix C. The Court of Appeals granted a stay of its judgment, a copy of which is attached as Appendix D. This petition is being filed within the time allowed by this Court (Appendix C). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

FEDERAL STATUTES INVOLVED

Section 7 of the Endangered Species Act of 1973, 87 Stat. 884, 892, 16 U.S.C. §1536, states:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

23 U.S.C. §101. Definitions and declaration of policy.

(b) It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the "Interstate System," is essential to the national interest and is one of the most important objectives of this Act. It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the twenty three years' appropriations authorized for the purpose of expediting its construction, reconstruction, or improvement, inclusive of necessary tunnels and bridges, through the fiscal year ending June 30, 1979, under section 108(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 374), and that the entire System in all States be brought to simultaneous completion. Insofar as possible in consonance with this objective, existing highways located on an interstate route shall be used to the extent that such use is practicable, suitable, and feasible, it being the intent that local needs, to the extent practicable, suitable, and feasible, shall be given equal consideration with the needs of interstate commerce.

It is further declared that since the Interstate System is now in the final phase of completion it shall be the national policy that increased emphasis be placed on the construction and reconstruction of the other Federal-aid systems in accordance with the first paragraph of this subsection, in order to bring all of the Federal-aid systems up to standards and to increase the safety of these systems to the maximum extent.

* * *

(e) It is the national policy that to the maximum extent possible the procedures to be utilized by the Secretary and all other affected heads of Federal departments, agencies, and instrumentalities for carrying out this title and any other provision of law relating to the Federal highway programs shall encourage the substantial minimization of paperwork and interagency decision procedures and the best use of available manpower and funds so as to prevent needless duplication and unnecessary delays at all levels of government.

QUESTIONS PRESENTED

(1) Whether the Court of Appeals for the Fifth Circuit has incorrectly decided an important question of federal law which has not been, but should be, settled by this Court.

(2) Whether the Court of Appeals erred in determining that the Secretary of the Interior under Section 7 of the Act was the ultimate authority to decide whether or not other federal agencies had taken all necessary action to insure that its actions will not jeopardize the continued existence of an endangered species or destroy or modify habitat critical to the existence of the species.

(3) Whether the decision of the Court of Appeals for the Fifth Circuit is in conflict with the decision of the Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

This action was begun on May 23, 1975, by the National Wildlife Federation together with its affiliate, the Mississippi Wildlife Federation.[1] The Complaint in two counts alleged that the Secretary of Transportation (the Secretary) and named subordinates in the Federal Highway Administration (FHWA) had violated federal law when they approved construction of the final 18.9 mile section of Interstate No. 10 (I-10) in Mississippi. Count No. I alleged that construction of this project as approved by the FHWA would result directly and indirectly in a threat to the existence of the Mississippi Sandhill Crane (Grus Candensis Pulla), an endangered subspecies, and a destruction and modification of its "critical" habitat in violation of Section 7 of the Endangered Species Act, 87 Stat. 884, 892, 16 U.S.C. §1536.[2] Count No. II alleged a violation by the Secretary of Section 4(f) of the Department of Transportation Act, 82 Stat. 815, 824, 49 U.S.C. §1653(f).[3] Although no relief was requested against the state defendant, i.e., E. L. Boteler, Director, Mississippi State Highway Department, petitioner herein, the State of Mississippi is vitally affected by the relief granted since it will be prohibited from receiving federal funds in order to complete the section of highway in question. It is for this reason that the state defendant is petitioning this Court for a Writ of Certiorari. It should be here noted that the fed-

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1. Hereinafter referred to collectively as the NWF.

2. In the complaint, the NWF suggested a violation of the consultation provisions of Section 7. However, this was subsequently abandoned.

3. The district court held that Section 4(f) was not applicable; the court of appeals affirmed thereto. Therefore, Section 4(f) is not in question in this petition. The petition is limited to Section 7 of the Endangered Species Act.

eral defendants are made respondents to this action pursuant to this Court's Rule 21(4).

The NWF requested declaratory and injunctive relief. The district court was asked to declare unlawful the federal approval of plans, specifications and estimates made on April 20, 1975, by the Division Engineer, and to enjoin construction until modifications in the planning and construction were made by FHWA.[4] Specifically, the court was asked to order a halt to construction until (1) the FHWA agreed to eliminate the Earl Bond Road interchange, a certain frontage road near that interchange and any borrowing within sensitive areas of the habitat; to move the alignment of the road 200 yards south at a certain point; and (2) to purchase 10,000 acres of land with money from the highway trust fund to replace land to be taken, directly and indirectly, from the habitat.

The action came on for decision, as permitted by Rule 65(a)(2), F.R.Civ.P., by way of a combined hearing on NWF's application for a preliminary injunction and a trial on the merits which was held on June 26, 1975. Thereafter, on August 4, 1975, the district court issued its findings of fact and conclusions of law. The court held that it had jurisdiction under the Endangered Species Act of this citizen suit,[5] as the NWF had given proper and sufficient notice of an alleged violation of Section 7.[6] On the merits of this claim, the trial court held that the NWF had not proved a violation. Relying principally on the testimony of Jacob M. Valentine, Jr., a biologist with the United States Fish and Wildlife Service (Wildlife Service) and the acknowledged expert on Mississippi Sandhill Cranes, the trial court found the highway segment as planned would not directly endanger the species or modify or destroy its critical habitat. As for any possible indirect effects from possible secondary development that might occur as a result of the highway, the trial court found the record (especially as to effects of the interchange at Earl Bond Road) "totally devoid of any statement or opinion rising above mere speculation." Final judgment was entered on August 8, 1975.

4. The NWF does not contend that the highway segment should never be built.

5. See 16 U.S.C. §1540(g).

6. The court also held that the NWF had standing to sue under the section and that the claim was not barred by laches.

An appeal was taken by plaintiffs to the United States Court of Appeals for the Fifth Circuit. As to the Section 7 question, the Court reversed the district court.

I-10 is a part of the National System of Interstate and Defense Highways; it is a limited access, transcontinental route connecting Los Angeles, California, with Jacksonville, Florida. In Mississippi, I-10 will be 77.1 miles long. The 77.1 miles from Louisiana to State Route No. 57 in Jackson County, Mississippi, is now constructed and open to traffic. Only 18.9 miles from Route No. 57 to the Alabama line remain to be built. I-10 will be constructed by Mississippi with 90 percent financing by the FHWA.[7] This suit involves a 5.7 mile segment of this uncompleted portion from Route 57 to the west bank of the Pascagoula River.

This 5.7 mile segment has been considered since 1963. All of the right of way was acquired prior to the bringing of this action, most before 1970. The FHWA approved plans, specifications and estimates (PS&E) for the project on April 30, 1975, thereby obligating the United States to participate in its cost.[8] This segment, as a unit with the

7. See 23 U.S.C. §101, et seq.

8. See 23 U.S.C. §106(a).

remainder of the 18.9 miles, was subject to full environmental assessment prior to PS&E approval, the sufficiency of which has not been challenged. A draft environmental impact statement (EIS) was circulated beginning on October 29, 1974, and a final EIS (FEIS) was transmitted to the Council on Environmental Quality (CEQ) on March 13, 1975. The Mississippi Sandhill Crane is fully considered in these documents. Following approval, the Mississippi Highway Department on May 27, 1975, let the contract for construction of this segment. Approval was suspended pending action by the district court. The contract was approved following the final judgment of the district court.

The Mississippi Sandhill Crane was listed as an endangered subspecies on June 4, 1973.[9] Approximately 40[10] are in existence, with their sole natural habitat being Jackson County, Mississippi. The subspecies has several individual characteristics: These cranes do not migrate for mating or any other purpose; they mate as couples for life, with particular nests that will be used repeatedly and defended;[11] nests are located only in low, wet and relatively open areas; in winter, groups of these birds will flock together. Because of their need for special nesting areas, "the essential factor in the perpetuation of this subspecies is the preservation of its nesting habitat."

The habitat of the Mississippi Sandhill Crane is located in the southeast corner of that part of Mississippi

9. See 39 Fed.Reg. 14678. This was pursuant to the Endangered Species Act of 1969, 83 Stat. 283, repealed and replaced by the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. §1531, et seq.

10. The number may be as high as 50 or as low as 30. What proportion of these birds is located in the immediate vicinity of the 5.7 mile section is not disclosed in the record.

11. This characteristic of defending their nest area is known as territoriality.

(Jackson County) which fronts on the Gulf of Mexico (R. Vol. II, 23). According to the NWF, the size of the habitat is 40,000 acres; the Department of the Interior, in making its emergency determination under Section 7 of the Endangered Species Act that this habitat was critical, included nearly 100,000 acres of land, 40 Fed. Reg. 17501, 40521; and Mr. Valentine, the expert on these cranes, in his testimony for the NWF stated that the critical habitat was only 20,000 acres.

The Wildlife Service has proposed that a refuge consisting of 11,000 acres in two units be created within the habitat for these birds. Although a portion of the western unit, i.e., that unit west of State Route 57, would be bisected by that part of I-10 already constructed, I-10 would for the most part be the southern boundary of this western unit.[12] The eastern unit, known as the Fountainebleau unit, would be bisected by the 5.7 mile segment of I-10 that is the subject of this suit. According to Mr. Valentine, half of the habitat, or 10,000 acres, lies east of State Route 57.[13]

The Nature Conservancy, a private body, late in 1974 purchased 1,700 acres of land which is to be included in the Eastern Unit. This was after all right of way had been obtained for I-10 in this 5.7 mile segment. By a letter dated August 12, 1974, the Wildlife Service proposed to purchase this land for inclusion in the proposed refuge if funding should be obtained from Congress. In addition, the proposed refuge would include Section 16 land owned by the State of Mississippi for the economic benefit of the Jackson County School System, not as a refuge.

12. The effect of the highway on the western unit is not subject to this action.

13. It follows that the other half, or 10,000 acres, lies west of State Route 57 where I-10 is complete.

After the State Department of Highways and the FHWA became aware of the presence of the crane, the alignment of I-10 was altered to avoid known nesting areas. Consultation was had with the Wildlife Service, and others, repeatedly since 1963 when this project began. The highway will cross the proposed eastern unit at its most narrow point. I-10 will cross four miles of habitat east of State Route 57 and one-and-a-quarter to one-and-a-half miles of the proposed eastern unit of the refuge. No interchange will be located on land to be included in the proposed refuge. The nearest interchanges will be a mile-and-a-half, respectively, west and east of the proposed eastern unit.

The highway will directly take only 300 acres of land from the habitat east of Route 57 and only 59 to 90 acres from the eastern unit of the proposed refuge. The Earl Bond Road interchange will take only 20 acres of habitat. The highway will use both high and low lands. Although it will cross Savannah, I-10 will not use any such land where nests are known to be located. Movement of the alignment of the highway 200 yards south as recommended by the NWF would cause the highway to be closer to vital nesting areas. Beyond the statements in the final EIS, no evidence on secondary development was produced by the NWF, save conclusory opinion testimony by Mr. Valentine, a non-expert in the fields of urban and highway planning, and similar statements in one or two letters.

The NWF's allegation of a violation of Section 7 of the Endangered Species Act is premised on the testimony of Mr. Jacob M. Valentine, Jr., who is an employee of the Wildlife Service and the acknowledged expert on the Mississippi Sandhill Crane. Mr. Valentine was the only substantive witness presented by the NWF. His expertise

was built on investigations beginning in 1963 to determine the consequences of I-10 on the crane; and was considered by FHWA prior to its decision approving this project.

Mr. Valentine admitted that the loss of 300 acres of land, directly attributable to the highway, of the 10,000 acres of habitat east of Route 57, would still allow sufficient space for normal growth, movement, feeding, breeding and shelter required by the crane and that the highway would not interfere with any of the birds' individual characteristics. Mr. Valentine further stated that the highway would in certain respects, by blocking cross-movement through the habitat, be beneficial to the crane. He also conceded that no tests had been conducted to substantiate his opinion on noise and vibratory effects of I-10 on the crane and that a change in the alignment would bring I-10 closer to nesting areas.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals for the Fifth Circuit Has Incorrectly Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

An interpretation of Section 7 of the Endangered Species Act of 1973 has not heretofore been addressed by this Court. In fact, the first occasion for an interpretation thereof was in the case sub judice.

After meaningful "consultation with" and "the assistance of the Secretary" of the Interior, the Secretary of the Department of Transportation took such action as

"necessary to insure that actions authorized, funded or carried out by [it did] not jeopardize the continued existence of such endangered species [Mississippi Sandhill Crane] and threatened species or result in the destruction or modification of habitat of such species" which has been determined by the Secretary of the Interior to be critical.

The district court reviewed the evidence upon which the Secretary of the Department of Transportation made his decision. Further, oral and documentary evidence was produced at the trial. Based thereon, the district court determined that the action of the said Secretary was not arbitrary or capricious.

The Court of Appeals for the Fifth Circuit, although paying lip service to the proposition that the plaintiffs had the burden of showing that the decision of the Secretary of the Department of Transportation was arbitrary and capricious and was not based on a consideration of the relevant facts and whether there had been a clear error of judgment, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, in effect actually placed the burden upon the defendants to show that it had taken all actions necessary "to insure" that any action authorized, funded or carried out by them does not jeopardize the existence of an endangered species or destroy critical habitat of such species.

The Court of Appeals placed great emphasis upon the phrase "to insure" and decided that "to insure" meant "to guarantee." This interpretation of Section 7 would impose upon federal agencies a duty not required by the statute and one which would adversely affect the carrying out of their responsibilities. The language of Section 7 and its legislative history make clear that Congress did not intend to apply a straitjacket upon agency decision-

making, whenever an adverse effect on an endangered species might possibly be anticipated. Section 7 merely directs federal agencies to "consult with" the Secretary of the Interior and to be "assisted" by him in utilizing their authority to further the purpose of the Act.

The final 18.9 mile segment of I-10 was approved by the FHWA based on its belief, gained through the environmental assessment process, that the highway would not directly pose a danger to the existence of the crane nor destroy or modify "critical" habitat. The final environmental impact statement reflects that the alignment of the highway will not traverse any known area of nesting, which is the vital part of the habitat necessary for survival of the species, and would cross the proposed refuge at its most narrow point. The evidence before the district court affirmed the finding of the FEIS that no direct harm would result to the crane or its critical habitat from the highway.

The FHWA recognized that danger to the crane and its habitat was posed by secondary development that could be expected to result from the highway. The decision to approve the project was made, since evidence indicated the danger would be minimal. The FEIS reflects that the land best suited for the crane is not the best suited land for development and that, because of the design of the highway, development would be expected only in the immediate area of the interchange. The NWF produced no evidence that development to be attributed to the highway would exceed that projected by the FHWA. The decision of the FHWA to approve construction on these facts was not arbitrary or capricious, and the district court so found.

The decision of the Secretary of the Department of Transportation is entitled to a presumption of regularity.

Pacific States Box & Basket Co. v. *White*, 296 U.S. 176; *United States* v. *Chemical Foundation*, 272 U.S. 1.

Although the Court of Appeals may have had the authority to inquire into the facts in a searching and careful manner, the ultimate standard of review is still a narrow one. The Court was not empowered to substitute its judgment for that of the agency or the district court. Petitioners submit that even after such a searching and careful inquiry, such would not support a finding that the decision of the Secretary of the Department of Transportation was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402. Nor would it support a finding that the district court was "clearly erroneous" in its ruling upholding the decision of the Secretary of the Department of Transportation. Rule 52(2), F.R.Civ.P.; *United States* v. *United States Gypsum Co.*, 333 U.S. 364; *Guzman* v. *Ruiz Pichirilo*, 369 U.S. 698; *United States* v. *Singer Mfg. Co.*, 374 U.S. 174.

Petitioners suggest that this Court should grant the Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit in order to interpret Section 7 of the Act so that it will have an even application throughout the nation. It is obvious that Section 7 will be drawn into litigation throughout the nation, and therefore, it is incumbent upon this Court to give a definitive nationwide interpretation thereto.

II.

The Court of Appeals Erred in Determining That the Secretary of the Interior Under Section 7 of the Act Was the Ultimate Authority to Decide Whether or Not Other Federal Agencies Had Taken All Necessary Action to Insure That Its Actions Will Not Jeopardize the Continued Existence of an Endangered Species or Destroy or Modify Habitat Critical to the Existence of the Species.

The Court of Appeals for the Fifth Circuit reversed the district court and, in remanding to the district court, directed it to enter an injunctive order restraining the defendants (a) from initiating or carrying out any further work or incurring any further contractual obligations with respect to the Earl Bond Road Interchange, and (b) from excavating any borrow pits in the 100,000 acre area determined to be emergency critical habitat for the Mississippi Sandhill Crane. The Court refused to order specific modification in the highway project.[14] Deferring to the "primary jurisdiction" of the Department of the Interior, the Court of Appeals directed that the injunction should "remain in force until the Secretary of the Department of the *Interior* determines that the necessary modifications are made in the highway project to insure that it will no longer jeopardize the continued existence of the Mississippi Sandhill Crane or destroy or modify critical habitat of the Mississippi Sandhill Crane." (Emphasis added).

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14. The Court correctly recognized that the determination was an administrative decision. *Butz* v. *Clover Livestock Comm.*, 411 U.S. 182; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402; *Consolo* v. *Federal Maritime Comm.*, 383 U.S. 607; *Federal Power Comm.* v. *Idaho Power Co.*, 344 U.S. 17.

Section 7 of the Endangered Species Act (16 U.S.C. §1536) states:

> "The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical."

The Court of Appeals in its decision correctly held that Section 7 did not give the Secretary of the Interior a veto power over the actions of other federal agencies and that, where there had been meaningful consultation, it was for the federal agency involved to determine whether it had taken all necessary action to insure that its actions will not jeopardize the continued existence of an endangered species or destroy or modify habitat critical to the existence of the species.

But even though the Court of Appeals correctly stated the law that the Secretary of the Interior did not have veto power under Section 7 of the Act, the Court in effect gave veto power to the said Secretary by making the injunction continue until the said Secretary had "determine[d] that all necessary modifications are made in the highway project" to comply with Section 7.

We submit to the Court that the directions of the Court of Appeals in this regard is contra to the clear dictates of the statute. There is nothing in the language of Section 7 of the Act which commands federal agencies to forfeit to the Secretary of the Interior their responsibility for ultimate decisions within the scope of their authority.[15]

The primary thrust of Section 7 is the requirement that agencies undertake meaningful consultation with the Secretary of the Interior before undertaking action which may affect endangered species, but the legislative history[16] and

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15. The Federal defendants in their Petition for Rehearing or Clarification in the Court of Appeals stated that they were authorized to state that the Secretary of the Interior agreed with the position of the defendants that Section 7 did not give to the Secretary of the Interior authority to make necessary modifications in the highway project but that this authority was exclusively that of the Secretary of the Department of Transportation. A copy of that portion of the Federal defendants' Petition is attached as Appendix E.

16. Senator Tunney, floor manager of the bill in the Senate, and Senator Cook discussed the impact of Section 7 as follows (119 Cong. Rec. (daily ed.), S. 14536 (July 24, 1973)):

> MR. COOK. * * * The point I have in mind is that we have the Pioneer Weapons Hunting Area in the State of Kentucky. It is the only one of its kind in the United States. There is no other. It is a tremendous nesting area for wild turkeys.
>
> I might suggest that the Corps of Engineers decided that it would build a road right through the middle of this area. We have tried our best to have them change the route of the road. They had alternate routes, but they decided, despite their alternative routes, that this is where they would build the road.
>
> This language means that they have to consult with the respective agencies under this bill, and they have to consult with the respective State agencies in order to work out this problem. That is exactly what it means. And I would be less than candid if I did not explain that to the Senator.
>
> MR. TUNNEY. Mr. President, as I understand it, after the consultation process took place, the Bureau of Public Roads, or the Corps of Engineers, would not be prohibited from building such a road if they deemed it necessary to do so.

(Continued on following page)

the statute itself indicate that the final responsibility for decisionmaking must, of course, lie with the agency itself. It logically follows that the federal agency involved must also be responsible for determining whether "all necessary action" has been taken to insure that the "continued existence" of an endangered or threatened species will not be "jeopardized" and that a "critical habitat" will not be "destroyed or modified." Petitioners recognize that such determination is, of course, reviewable in the appropriate federal court, and we submit that the proper standard for review is an abuse of discretion standard. Although the views of the Secretary of the Interior may be accorded some weight by a reviewing court in ascertaining whether an

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Footnote continued—

> MR. COOK. The point is that they would then be doing it after consultation with the respective agencies, rather than making that decision on their own.
>
> MR. TUNNEY. But they would have the final decision after consultation.
>
> MR. COOK. The Senator has put me in a rather bad light. Under the terms of this, it would have to be under an agreement worked out with the respective agencies.
>
> MR. TUNNEY. Mr. President, as I understand the legislation just reading the language:
>
> > All other departments, agencies, and instrumentalities of the Federal Government shall, in consultation and with the assistance of the Secretary—
> >
> > (b) take such action as is necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of any endangered or threatened species, or result in the destruction or modification of any habitat of such species which is determined by the Secretary, after consultation to the extent appropriate and necessary with affected States, to be a critical habitat of such species.
>
> So, as I read the language, there has to be consultation. However, the Bureau of Public Roads or any other agency would have the final decision as to whether such a road should be built. That is my interpretation of the legislation at any rate.

agency had violated its discretion with regard to Section 7, we submit that such views are not paramount and exclusive.

Further, the interpretation of Section 7 as applied in the action sub judice is at total war with the Federal-Aid Highway Act of 1973. The same 93rd Congress which enacted the Endangered Species Act of 1973 stated in regard to Federal-Aid highway programs: "It is hereby declared that the *prompt and early completion* of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the 'Interstate System,' is essential to the national interest and is one of the most important objectives of this Act." [Emphasis added] Continuing, the 93rd Congress stated that it was important "that the entire System in all States be brought to simultaneous completion." 23 U.S.C. §101(b) This same Congress admonished that "it is the national policy that to the maximum extent possible the procedures to be utilized by the Secretary [of Transportation] and all other affected heads of Federal departments, agencies, and instrumentalities for carrying out this title and any other provision of law relating to the Federal highway programs shall encourage the substantial minimization of paperwork and interagency decision procedures and the best use of available manpower and funds so as to prevent needless duplication and unnecessary delays at all levels of government." *Ibid.*, (e). Nowhere in either the Federal-Aid Highway Act of 1973 or the Endangered Species Act of 1973 did Congress indicate that it intended that the Secretary of the Interior would have the paramount, ultimate and final decision-making power in regard to the construction of highways declared by Congress to be of "primary importance to the national defense." Regardless of the inter-

pretation that might be given to Section 7 of the Endangered Species Act of 1973 as it relates to other federal agencies, we submit that when the section is read in pari materia with 23 U.S.C. §101(b) and (e), a court is driven to the conclusion that the Secretary of the Department of Transportation has the primary, ultimate, absolute and final duty and responsibility to make decisions as to the actions that his department must take to satisfy the dictates of said Section 7, subject only to the statutory requirement of prior "consultation" with the Secretary of Interior regarding the endangered species and their critical habitat. To hold otherwise would prevent the Secretary of the Department of Transportation from implementing the policies of the 93rd Congress as embodied in 23 U.S.C. §101(b) and (e) and would have a substantial adverse effect on the national interest as stated in said section.

We submit to the Court that the Court of Appeals for the Fifth Circuit was in error in reversing the district court and granting the Secretary of the Interior absolute authority to determine what actions must be taken by the Department of Transportation to fulfill its duties and responsibilities pursuant to said Section 7.[17]

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17. The Fifth Circuit compounded its error by plainly stating it was abdicating its responsibilities for judicial review and deferring such authority in this case to the Secretary of Interior. No other rational conclusion can reasonably be made from the following language in its opinion, to-wit:

> ". . . we defer to (the Department of Interior's) determination of what modifications are necessary to bring the highway project into compliance with Section 7." *NWF* v. *Coleman*, 529 F.2d 359, at page 375.

Further, the Fifth Circuit, without providing any guidelines, gave Interior complete authority to make such modifications to the highway as Interior might desire, not even limited to the relief requested by the Plaintiffs.

This relief is contra to the principles of law earlier stated by the Fifth Circuit in its opinion.

III.

The Decision of the Court of Appeals for the Fifth Circuit Is in Conflict With the Decision of the Court of Appeals for the Eighth Circuit.

The Court of Appeals for the Eighth Circuit in *Sierra Club* v. *Froehlke, Secretary of the Army*, 534 F.2d 1289, interpreted Section 7 of the Endangered Species Act of 1973 differently from the interpretation of said Act by the Court of Appeals for the Fifth Circuit in the action sub judice. The Court of Appeals for the Eighth Circuit did not interpret the phrase "to insure" to mean "to guarantee." The Eighth Circuit, we submit, properly interpreted said Section 7. The Eighth Circuit, unlike the Fifth Circuit, held that said Section 7 did not give to the Secretary of the Interior the ultimate authority to determine whether or not another federal agency had violated its discretion with regard to Section 7. The Eighth Circuit properly held that the final decision to proceed with a particular project in the face of alleged adverse effects on an endangered species is one committed to the sound discretion of the agency involved, subject only to the statutory requirement of prior "consultation" with the Secretary of Interior regarding the endangered species and their critical habitat.

In the case sub judice, the Court of Appeals for the Fifth Circuit gave controlling weight to the views of the Department of Interior and the Fish and Wildlife Service. In *Sierra Club*, supra, the plaintiffs had urged the Eighth Circuit to give controlling weight to the views of the Secretary of the Interior but the Eighth Circuit rejected such request on the ground that Section 7 of the Act did not so require. In fact, the Eighth Circuit held that the opposite was the clear import of Section 7. Further,

whereas the Court of Appeals for the Fifth Circuit determined that the Act required *acquiescence* by the Department of Interior in any decision made by a federal agency, the Eighth Circuit rejected this position and stated: "Consultation under Section 7 does not require acquiescence." Unlike the Fifth Circuit, the Eighth Circuit held that "should a difference of opinion arise as to a given project, the responsibility for decision after consultation is not vested in the Secretary [of Interior] but in the agency involved."

It is ironical that the Eighth Circuit quotes from *National Wildlife Federation* v. *Coleman,* 529 F.2d 39, for certain principles of law, but in the final analysis its application of Section 7 is completely opposite and contra to that of the Court of Appeals for the Fifth Circuit.

We submit to the Court that the interpretation of Section 7 of the Act made by the Court of Appeals for the Eighth Circuit is the proper interpretation of said Section and that this Court should grant the Petition for Writ of Certiorari to resolve the conflict in the Circuits.

CONCLUSION

We suggest to the Court that the Writ should issue since the Court of Appeals incorrectly decided an important question of federal law which has not been, but should be, settled by this Court and, further, in order to settle the conflict between the circuits.

Further, the Writ should issue so that this Court can interpret Section 7 so that it will have an even and equal application nationwide.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

Appeal from the United States District Court for the Southern District of Mississippi.

Before THORNBERRY, SIMPSON and MORGAN, Circuit Judges.

SIMPSON, Circuit Judge:

Appellants, National Wildlife Federation (NWF) and Mississippi Wildlife Federation (MWF), brought this action in the court below seeking declaratory relief and to enjoin the construction of a 5.7 mile section of Interstate Highway Route 10 (I-10)[1] through Jackson County, Mississippi, which would traverse the habitat of the Mississippi Sandhill Crane (Grus canadensis pulla) an endangered sub-species. Count I of the complaint alleged that construction of this segment of I-10 and of an interchange at the Earl Bond Road (also known as the Gautier-Vancleave Road) would threaten the continued existence of the crane and would result in the destruction and modification of its critical habitat in violation of Section 7 of the Endangered Species Act of 1973, Title 16, U.S.C., Section 1536 (hereinafter § 7). Count II alleged a violation by appellee Coleman, Secretary of Transportation, of Section 4(f) of the Department of Transportation Act, Title 49, U.S.C., Section 1653(f) (hereinafter § 4(f)), in that he had not determined that there is no feasible and prudent alternative to the construction of the highway as located and designed, and that all appropriate measures

1. Federal Project No. I-10-I(25)57; State Project No. 51-0010-01-025-10.

to minimize the harm to the habitat of the crane have been planned. The appellants requested that construction of the 5.7 mile section of I-10 be enjoined until (i) modifications are made to insure that the proposed segment will not jeopardize the continued existence of the Mississippi Sandhill Crane, or destroy or modify habitat critical to the crane, and (ii) appellee Coleman makes the findings required under § 4(f). Appendix A hereto is a map of the area.

After a hearing on the merits combined with a hearing on appellants' Request for a Preliminary Injunction, F.R.Civ.P., Rule 65(a)(2), the district court entered an order dismissing the complaint. *National Wildlife Federation v. Coleman*, S.D.Miss.1975, 400 F.Supp. 705. The district court held that the determination by the Office of the Attorney General of the State of Mississippi on the nonapplicability of § 4(f) was binding on the Secretary of Transportation, and, therefore, that § 4(f) provided no jurisdictional basis for the suit. *Id.* at 709. The court further held that although it had jurisdiction under § 7, the appellants had failed to meet their burden of proving a violation of that section since the project in controversy would not jeopardize the continued existence of the Mississippi Sandhill Crane or result in the destruction or modification of its habitat.

The NWF and MWF filed a notice of appeal on August 24, 1975, and on August 20 filed a motion for an injunction pending appeal. On September 10, 1975, we ordered the appeal expedited and directed that the motion for injunction be carried with the case. Following oral argument on December 9, 1975, we enjoined appellees until further order from (a) initiating or carrying out any further work or incurring any further contractual obligation with respect to the interchange at the Earl Bond

Road; and (b) excavating any borrow pits in Sections 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, and 37 of Township 7 South, Range 7 West, of the lands involved in this appeal. This order was to remain in effect pending this decision on the merits and the disposition of any petitions for rehearing hereafter filed.

After examination of the record, we hold that the requirements of Section 7 of the Endangered Species Act of 1973 were not complied with by the appellees. We reverse the trial court and remand the cause for further proceedings.

BACKGROUND

I-10, part of the National System of Interstate and Defense Highways, Title 23, U.S.C., Section 101(b), is a limited access highway across the southern United States which when completed will extend from Los Angeles, California, to Jacksonville, Florida. In Mississippi I-10 will be approximately 77.1 miles long traversing Hancock, Harrison, and Jackson Counties, and is being constructed with 90% federal financing pursuant to the Federal-Aid Highway Act, Title 23, U.S.C., Section 101 *et seq.* The construction of the segment of I-10 in Mississippi has been under consideration since 1963, and is being built by the Mississippi State Highway Department (MSHD) in conjunction with and pursuant to authorization by the Federal Highway Administration (FHWA). The right-of-way for the Mississippi segment of I-10 was acquired prior to the filing of this action, most of it prior to 1970. Approximately 58.2 miles of I-10 in Mississippi from the Louisiana border to Mississippi State Highway 57 (Highway 57) is near completion. The remaining 18.9 mile segment of I-10 in Mississippi extends from Highway 57 eastward to the Alabama line and contains the 5.7 mile segment in controversy. This 5.7 mile

section runs from an interchange at the intersection of I-10 and Highway 57 on the west to the west bank of the Pascagoula River on the east.[2] Within this 5.7 mile segment the plans call for the construction of an interchange at the junction of the Earl Bond Road and I-10. Both the interchange and the 5.7 section of I-10 will transect the habitat of the Mississippi Sandhill Crane, bisecting the eastern unit of a proposed refuge for the crane, and traversing Section 16 land held by the State of Mississippi in trust for the Jackson County School District.

An estimated number of 40 Mississippi Sandhill Cranes[3] still exist, their range being confined to a total area of approximately 40,000 acres in Jackson County, Mississippi. The Department of Interior designated the Mississippi Sandhill Crane an endangered sub-species on June 4, 1973, listing it on the Department's Endangered Species Register per designation at 38 Fed. Reg. 14678, pursuant to Section 3 of the Endangered Species Act of 1969, Pub. L. 91-135, Dec. 5, 1969, repealed and replaced by the Endangered Species Act of 1973, Title 16, U.S.C., Section 1351 *et seq*. The sole natural habitat of the Crane is marked by the Jackson-Harrison County line on the west, the Pascagoula River on the east, United States High-

2. This 5.7 mile section of I-10 transects Sections 18, 17, 16, 15, 14, 13, and 37 of Township 7 South, Range 7 West.

3. The Mississippi Sandhill Crane is a sub-species of sandhill cranes. It is the same size as the Florida Sandhill Crane (Grus canadensis pratensis) and prior to 1972 the Mississippi Sandhill Cranes and the Florida Cranes were thought to be of the same sub-species. Aldrich, *A New Sub-species of Sandhill Crane in Mississippi*, 85 Proceedings of the Biological Society of Washington 63 (1972). Mississippi Cranes are distinguishable from other sub-species of sandhill cranes because of darker plumage and the presence of a red tuft on the top of the head.

Beginning in 1965 eggs were taken from the nests of the Mississippi Sandhill Crane population in Jackson County for the purpose of propagation in captivity. In 1971 eight of the Cranes had been reared to adult plumage at the Patuxent Wildlife Research Center, Laurel, Maryland.

way 90 on the south, and Bluff Creek on the north. For breeding grounds the cranes use only wet, semi-open, and savanna-like lands with marsh areas, with more trees than is typical of the nesting habitat of other sub-species of sandhill cranes. The nests are built on small openings in shallow water from vegetation surrounding the nest. Although the cranes are non-migratory, during the winter months they flock together in a roosting site in the eastern portion of the Pascagoula Marsh.

In 1974, after the right-of-way for the segment of I-10 had been acquired, the U. S. Fish and Wildlife Service (Fish and Wildlife Service) proposed the creation of a Mississippi Sandhill Crane Refuge consisting of two separate units totaling 11,300 acres in Jackson County. The western unit, Ocean Springs,[4] of the proposed refuge lies east of Highway 57 and is bounded and traversed in part on the South by I-10. As noted earlier this portion of I-10 is substantially complete and is not involved in this controversy.[5] The eastern unit, Fountainbleau,[6] of the pro-
compass lands in Sections 4, 5, 8, 9, 10, 15, 16, 20, 21, and 22 of
posed refuge, which comprises approximately one-half of the total refuge, is traversed at narrowest point by I-10. This portion of the proposed refuge includes Section 16 land held by the State of Mississippi in trust for the support of the Jackson County School System. By letter dated August 12, 1974, the Fish and Wildlife Service requested that the Nature Conservancy,

4. The western unit of the refuge when complete will encompass lands in Sections 28, 29, 30, 31, 32, 33, and 34 of Township 6 South, Range 8 West, and Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, and 15 of Township 7 South, Range 8 West.

5. Construction of this portion of I-10 was initiated in advance of the passage of the Endangered Species Act of 1973.

6. The eastern unit of the refuge when complete will encompass lands in sections 4, 5, 8, 9, 10, 15, 16, 20, 21, and 22 of Township 7 South, Range 7 West.

a private organization, acquire approximately 2480 acres in the Fountainbleau unit, consisting of four privately owned tracts. In this letter the Director of the Fish and Wildlife Service proposed that the Conservancy acquire the land and hold it until the Service obtained sufficient funding from Congress to purchase it. If, however, the Service was unable to purchase the land within a reasonable time the Conservancy could "take such action as necessary to recover its investment." As a result of this proposal the Conservancy in late 1974 acquired approximately 2000 acres.[7] After the oral argument before us counsel for appellant NWF filed in these proceedings an affidavit of the Director of Land Acquisition of the Nature Conservancy which avers that on November 25, 1975, the Nature Conservancy transferred title to approximately 1,708 acres to the Fish and Wildlife Service.

The Fish and Wildlife Service in 1960 assigned Jacob M. Valentine, Jr., a wildlife management biologist, to study the effects of then proposed I-10 in Louisiana, Mississippi and Alabama. In a 1963 report titled "The Status of the Florida Sandhill Crane in Jackson County, Mississippi" Valentine stated that the proposed route of I-10 would "cross through the area used by the cranes as nesting, loafing, roosting, and feeding grounds". Valentine wrote in the report that at that time the greatest threats to the continued existence of the crane flock were timber management, housing developments, and the proposed I-10, and of the three the first was cause for the most immediate concern. The report concluded by recommending that the "most obvious solution" to avoid detrimental impacts to the Crane would be to create a sanctuary comprising 5,000 to 10,000 acres in the area north of U. S. Highway

7. The land acquired by the Nature Conservancy is located in Sections 4, 9, 10, 15, 20, 21, and 22 of Township 7 South, Range 7 West.

90, between Highway 57 and the junction of the Earl Bond and Martin Bluff Roads. Valentine also recommended that the route of I-10 be placed two or three miles north of the 1963 survey line, thereby placing the highway on the northern edge of the breeding territory, and that if the route could not be changed then entry-exits should be limited to one at Highway 57 and one at the Earl Bond Road.

On November 23, 1973, the Fish and Wildlife Service notified the MSHD that the Service proposed to acquire 11,360 acres of savanna grassland in Jackson County in order to protect the Mississippi Sandhill Crane, and that the Service was "extremely interested in close coordination involving all roads, interstate interchanges, etc., in this area (more specifically T 6&7 S, and R 7&8 W)." Similar concern was expressed by the Chief of the Game and Fisheries Division of the Mississippi Game and Fish Commission in a letter on September 4, 1974, in which he wrote that "[c]hanging and conflicting land use practices, the effect of highway construction and subsequent residential and commercial developments accelerated by construction, timber management practices, surface drainage and absence of controlled burnings, have contributed to deterioration of the cranes' habitat." The Fish and Wildlife Service wrote to the Assistant Chief Engineer for Planning and Design of the MSHD on September 19, 1974, expressing the opinion that on the basis of available information none of the MSHD's proposed projects would have any adverse impacts on Fish and Wildlife Installations, except for the proposed 11,360 acre refuge in Jackson County. Echoing the concern expressed in its letter of November 23, 1973, the Service again told the MSHD that it was "extremely interested in close coordination involving all roads, interstate interchanges, etc. in . . . the area" of the proposed refuge.

The FHWA on October 29, 1974, approved and adopted a draft environmental impact statement DEIS) for the construction of I-10 from Highway 57 to the Mississippi-Alabama state line. See National Environmental Policy Act of 1969, Title 42, U.S.C., Section 4332(2)(c); Title 23, U.S.C., Section 128. The Department of Interior requested three additional extensions of time in which to comment on the DEIS, because "the project's involvement with the proposed Sandhill Crane National Wildlife Refuge . . . necessitated consultations . . . with [the Department's] Office of the Solicitor." The Director of Conservation of the State of Mississippi Game and Fish Commission, however, in a letter to MSHD commenting on the DEIS recommended that the plans and specifications for the proposed segment of I-10 should exclude borrow pits[8] from any portion of Sections 15 and 16, of Township 7 South, Range 7 West, in addition to land under option by the Nature Conservancy since "[e]xcavations would lower the water table in immediate areas and take out much more good crane habitat."

The Final Environment Impact Statement, issued on March 10, 1975, incorporated the recommended changes of the Mississippi Game and Fish Commission as to the prohibition of borrow pits in certain areas. Final Environmental Impact Statement Interstate Route No. 10, Jackson County, Mississippi, at 31 (1975) (hereinafter FEIS). The FHWA, MSHD, and the Department of Transportation in the FEIS set forth the impact of I-10 on the Mississippi Sandhill Crane and its habitat as follows in part:

> "Environmental impacts will be both negative and positive in nature. One negative impact will be the crossing of the nesting and feeding habitat of the Mis-

8. A borrow pit is the excavated area remaining after earth has been removed for use as fill for road construction.

> sissippi Sandhill Crane, a threatened [sic] species. Impacts will result from the taking of crane habitat and from private development which accompanies a new highway facility." FEIS at Summary Sheet.
>
> . . .
>
> "B. *DETRIMENTAL IMPACTS*
>
> To properly serve the Gulf Coast area, construction of Interstate Route No. 10 will necessarily have some detrimental effects. The most significant impacts are encroachment on the habitat of the Mississippi Sandhill Crane and the crossing of the Pascagoula River Marsh.
>
> *The Threatened Wildlife of the United States*, a 1973 U.S. Fish and Wildlife Services publication, states that populations of the crane are declining 'chiefly because of reduction of suitable habitat which is semi-open and wet savannah by changing land use including drainage, planting of trees, suburban development, and highway building.' This section of Interstate Route No. 10 would commit approximately 40 acres of the crane's best nesting and feeding range to highway right of way. *Other than this loss of habitat, the direct effects of a highway facility on the existence of the crane are relatively unknown.* This is due to the fact that a major highway has not been constructed through their habitat area since the species has fallen under such close scrutiny.
>
> *The indirect effects of highway development, specifically the effects of residential and commercial development, are known, however. The crane cannot survive in built-up areas, and a certain amount of private development will always accompany construction of a major highway facility. This new development*

within the crane's habitat is the most significant effect that is to be feared. Unfortunately, the Mississippi State Highway Department has no control over private development outside the highway right of way. Another possible effect could be caused by the highway drainage ditches and structures.

There are, however, certain measures underway to lessen the impact of the highway. First of all, Interstate Route No. 10 will be a full control of access facility, thus restricting private development to interchange and frontage road areas only. Secondly, the Nature Conservancy, in conjunction with the U.S. Fish and Wildlife Service, is attempting to acquire several thousand acres in Jackson County in order to form a Federal Refuge for the Mississippi Sandhill Crane. Also, the Gulf Regional Planning Commission has recognized certain areas for resource conservation which include the nesting areas for the crane." FEIS at 23-24 (Emphasis added).

"The relative isolation of the crane colony and the general poverty of the soil in the area initially provided the security required for the crane's existence. This security has been threatened by the forces of civilization, thus bringing about a decrease in their numbers. The most destructive force on the crane, to date, has been timber management . . . . *Although timber management is no longer practiced in the habitat area, it did not cease before thousands of acres of savannahs and swamps were destroyed.*

At the present time, the greatest threats to the existence of the Mississippi Sandhill Crane are private development and the construction of Interstate Route No. 10. Unfortunately, the Mississippi State Highway

Department has no control over private development of privately owned land.

. . .

As for the construction of Interstate Route No. 10, it is exceedingly difficult to assess the exact impact of the highway on the crane. *One direct effect will be the removal of approximately 180 acres from the crane's range; this includes approximately 40 acres of nesting and feeding range and approximately 140 acres of roosting, loafing, and feeding range.* This loss of a small amount of habitat and its associated disturbance can be tolerated, according to a report prepared in 1963 by Jacob M. Valentine, Jr., Wildlife Management Biologist, Bureau of Sport Fisheries and Wildlife. *Also, drainage ditches associated with the facility could affect the water table to a slight degree.* The soil on the savannahs is predominately the poorly drained Rains soil with the seasonally high water table at the soil surface. *A lowering of the water table could cause brushy vegetation to establish in areas drained by these ditches. This effect could possibly extend as far as 70 feet beyond the highway right of way. It is felt that the primary effects of the highway will not come from the physical existence of the facility but from the inherent development which accompanies a new highway.*

. . .

As for measures to minimize harm caused by construction of the proposed project, most of these are initiated due to the design of the facility. Interstate Route No. 10 will be a full control of access facility, and the right of way limits will be fenced. This will preclude animal and pedestrian access to the highway at the same time preventing general trespass into the

crane's habitat. Because access to the highway will be limited to interchanges and frontage roads, the facility should effectively block the construction of other roads in this remote area. *This same fact will restrict development to interchange and frontage road areas,* thus prohibiting development all along the facility. This should help to maintain the crane's security." FEIS at 26-31 (Emphasis added).

Subsequent to approval of the FEIS by the Council on Environmental Quality, the NWF on March 21, 1975, wrote to appellee Tieman to express opposition to the construction of I-10 through the habitat of the Mississippi Sandhill Crane because of alleged violations of § 4(f) and § 7. In this letter the NWF recommended that the FHWA take no further action on the construction of I-10 in the area of the crane's habitat until the Secretary of the Department of Interior and the FHWA had discharged their respective obligations under § 7, and until the Secretary of Transportation had evaluated the applicability of § 4(f) to the project. On April 3, 1975, the Deputy Assistant Secretary of the Interior, Stanley Doremus, wrote to appellee Shaw commenting upon the FEIS and expressing the Interior Department's opposition to the project because of the potential for adverse effects on the habitat of the Mississippi Sandhill Crane. Further, Deputy Assistant Secretary Doremus stated the Interior Department's concern under § 7 for "interagency consideration of possible project changes which may avoid some of the adverse environmental effects." In relating the detrimental impacts of the proposed route of I-10 on the crane, Doremus noted that every acre of actual or potential habitat is vital to the survival of the crane and that there would be a direct loss of at least 406 acres of habitat, rather than the 180 acre estimate in the FEIS, plus additional direct loss of habitat

resulting from the excavation of borrow pits. Although acknowledging that the MSHD has no direct control over private development outside of the highway right-of-way, Doremus stated that "the location of private development is controlled by highway routing and placement of interchanges", and, therefore, pointed out that the exclusion of an interchange at the Earl Bond Road "would retard commercial and residential development along this segment of the project". Finally, in summary, three key items were found by the Department of Interior to warrant major consideration:

"1. All possible route alignments and designs which avoid or minimize adverse impacts on endangered species habitat,

2. Elimination of the I-10 interchange at Earl Bond Road (Gautier-Vancleave Road), and

3. Deletion from the proposed construction plans of all borrow pit/spoil areas along the right-of-way between [Highway] 57 and Martin Bluff Road."

The Department of Interior on April 25, 1975, again expressed its opposition to the segment of I-10 through Jackson County on the ground that the FEIS inadequately addressed the potential adverse effects on the Mississippi Sandhill Crane habitat.

The FHWA through appellee Shaw on April 30, 1975, gave final approval under Title 23, U.S.C., Section 106(a) of the plans, specifications, and estimates (P.S.&E. approval) for the 5.7 miles section of I-10 in controversy. On May 6, 1975, Curtis Bohlen, the Acting Assistant Secretary of the Interior Department wrote to appellee Tieman:

"To date, we are not aware that the Federal Highway Administration has instituted the necessary consulta-

tion requirements under [§ 7] of the Endangered Species Act. This letter is to request that you initiate such consultation. In addition, the Secretary of Interior must make a determination as to whether or not the habitat to be affected by this project is critical to the Mississippi sandhill crane. This determination must be made before the Federal Highway Administration will be able to fulfill the requirements of [§ 7]; that is, to ensure that the action authorized by you will not result in destruction or modification of such habitat."

On May 23, 1975, the appellants filed this suit in the district court. Although the MSHD let a contract for the 5.7 mile section in controversy on May 27, 1975, submission of that contract to the FHWA for approval was stayed pending the trial of this action. FHWA approval was given on August 5, 1975, and actual construction was begun on September 1, 1975, with a target completion date of May 29, 1978.

The day before the trial of this action, June 25, 1975, the Director of the Fish and Wildlife Service issued pursuant to Section 4(f) of the Endangered Species Act of 1973, Title 16, U.S.C., Section 1533(f) (2) (B), an emergency determination of "critical habitat" for the Mississippi Sandhill Crane.[9] That "critical habitat" as delineated in this

9. On April 22, 1975, the Department of Interior and the Department of Commerce published at 40 Fed.Reg. 17764-17765 the following interpretation of "critical habitat" as it relates to § 7 of the Endangered Species Act:

> "The term 'habitat' could be considered to consist of a spatial environment in which a species lives and all elements of that environment including . . . land and water area, physical structure and topography, flora, fauna, climate, human activity, and the quality and chemical content of soil, water and air.

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determination consists of approximately 100,000 acres in Jackson County and includes land transected by the highway project. The designation of "critical habitat" for the cranes became effective on publication at 40 Fed.Reg. 27501-27502, June 30, 1975. The Fish and Wildlife Service stated that the reasons for the emergency determination were that "[t]he maintenance of significant portions of habitat and the well-being of the crane are threatened by construction of a new segment of Interstate Highway I-10 between Mississippi State Highway 57 and the Pascagoula River", and that "[t]he construction activities, destruction of habitat, incidental intrusions, and subsequent related commercial and residential development of the area

Footnote continued—

> 'Critical habitat' for any Endangered or Threatened species could be the entire habitat or any portion thereof, if, and only if, any constituent element is necessary to the normal needs or survival of that species."
>
> . . .
>
> "Actions by a Federal agency which result in the destruction or modification of habitat considered 'critical habitat' for a given Endangered . . . species would not conform with section 7 of the Endangered Species Act . . ., if such an action might be expected to result in a reduction in the numbers or distribution of that species of sufficient magnitude to place the species in further jeopardy, or restrict the potential and reasonable expansion or recovery of that species. [A]pplication of the term 'critical habitat' may not be restricted to the habitat necessary for a minimum viable population.
>
> It is emphasized further that certain actions may not be detrimental to 'critical habitat'. There may be many kinds of actions which can be carried out within the 'critical habitat' of a species that would not be expected to result in such reduction in the numbers or distribution or otherwise adversely affect such species."

The Fish and Wildlife Service published a notice at 40 Fed.Reg. 21499-21501, May 16, 1975, to announce its intent to determine "critical habitat" for 108 endangered species, and that the Service was interested in receiving data quickly on ten species, including the Mississippi Sandhill Crane.

all constitute a significant risk to the well-being of the crane".[10] 40 Fed.Reg. at 27502.

SECTION 4(f) OF THE DEPARTMENT OF TRANSPORTATION ACT

Section 4(f) requires in part that the Secretary of Transportation not approve any project which requires the use of *publicly* owned land from a park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance or *any land* from an historic site of national, state, or local significance *unless* the Secretary *finds there is no feasible and prudent alternative* to the use of such land, and that all possible planning has been done to minimize harm to that protected area.[11]

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10. The emergency determination of critical habitat for the Mississippi Sandhill Crane remained in effect for only 120 days following its publication in the Federal Register. Therefore, the Fish and Wildlife Service on September 3, 1975, announced at 40 Fed.Reg. 40521-40522, a proposal to amend 50 C.F.R. Part 17 by adding a new Subpart F thereto for "critical habitats" and a new § 17.80 thereunder which would designate "critical habitat" for the Mississippi Sandhill Crane. The Service requested that all comments on this proposed amendment be received by the Service no later than October 6, 1975. This period was later extended to October 31, 1975. 40 Fed.Reg. 49348.

11. Section 4(f) of the Department of Transportation Act. Title 49, U.S.C., Section 1653(f) provides in full:

> "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of

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The appellants contend that the district court erred in holding that § 4(f) is inapplicable to certain lands affected by the highway project. This holding by the district court was based on two grounds: (i) that there are no § 4(f) lands used by the 5.7 miles segment of I-10, and (ii) that an opinion rendered by the Office of the Attorney General of Mississippi that the lands in question are not "publicly owned lands from a public park, recreation area, or wildlife and water fowl refuge" within the meaning of § 4(f) was binding on the Secretary of Transportation.

Prior to our discussion of the applicability of § 4(f) to the project, we address the issue of whether the district court erred in holding that the opinion of the Office of the Attorney General of Mississippi was determinative of the applicability of § 4(f) and binding on the Secretary of Transportation.[12] This court in *Named Individual Members of the San Antonio Conservation Society v. The Texas Highway Department*, 5 Cir. 1971, 446 F.2d 1013, cert. denied 1972, 406 U.S. 933, 92 S.Ct. 1775, 32 L.Ed.2d

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Footnote continued—

> national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreation area, wildlife and waterfowl refuge, or historic site resulting from such use."

Section 138 of the Federal-Aid Highway Act of 1968, Title 23, U.S.C., Section 138, is virtually identical in language to § 4(f), and the variances are inconsequential. *See* Cong.Rep. No. 1799, 90th Cong., 2d Sess., U.S.Code Cong. & Admin.News, pp. 3351, 3538 (1968).

12. The appellants concede in this court that the State of Mississippi holds title in trust for the Jackson County School District to the Section 16 lands in controversy, see Miss.Const. Art. 8, Section 211; *Jefferson Davis County v. Sinrall Lumber Co.*, Miss. 1909, 94 Miss. 530, 49 So. 611, and that this confers on the State jurisdiction under § 4(f) to make the threshold determination of whether this land is a wildlife refuge of state or local significance.

136, stated that Congress in enacting § 4(f) clearly "did not intend to leave the decision whether federal funds would be used to build highways through parks of local significance up to the city councils across the nation". *Id.* at 1026. Similarly, we find that the national policy "to preserve . . . wildlife and waterfowl refuges" would be frustrated by vesting in state or local officials having jurisdiction over publicly owned lands to be used for a federally funded highway the authority to make a final and binding determination of local significance. A more reasonable and enlightened interpretation of § 4(f) is that Congress intended that the threshold determination of the significance and use of state and local lands be made by those officials who are most likely to be aware of its importance to the local community and society. Once the appropriate jurisdictional officials, however, have made the initial determination of whether potentially protected § 4(f) lands are used for one of the purposes enumerated and are of national, state or local significance that decision is reviewable and reversible by the Secretary of Transportation. See *Environmental Defense Fund v. Brinegar*, E.D.Pa. 1974, 6 ERC 1577, 1593-94; *Harrisburg Coalition Against Ruining the Environment v. Volpe*, M.D.Pa.1971, 330 F.Supp. 918, 929.

The district court mistakenly relied upon dicta in *Pennsylvania Environmental Council, Inc. v. Bartlett*, 3 Cir. 1971, 454 F.2d 613, 623. Section 4(f) on its face gives the appropriate jurisdictional official the power only to assess "significance", and the Supreme Court has stated that the legislative history of that section indicates that the Secretary must go beyond the information supplied by state and local officials to reach "his own independent judgment". *Citizens to Preserve Overton Park, Inc. v.*

Volpe, 1971, 401 U.S. 402, 412, n. 28, 91 S.Ct. 814, 821, 28 L.Ed.2d 136, 151.[13]

The FEIS indicates that the Secretary of Transportation and the Department of Transportation fulfilled their duties under § 4(f) by reviewing the opinion rendered by the Office of the Attorney General of Mississippi and concluding that "[t]he project will not affect any 4(f) lands of any type". FEIS at 47-48. The appellants, however, assert that § 4(f) is applicable: (i) to the Section 16 land since it is publicly owned land used *in fact* as a sanctuary by the Mississippi Sandhill Crane; and (ii) to the land formerly held by the Nature Conservancy at the request of the Fish and Wildlife Service for the creation of a refuge which because of its actual use and beneficial ownership should be considered public land from a wildlife and waterfowl refuge.

Not all publicly owned land or land used as a wildlife refuge is protected by § 4(f). Section 4(f) of the Department of Transportation Act of 1966 originally provided:

> "The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of *any land*

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13. The Third Circuit in *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F.2d at 622, n. 10, quoted with approval a passage from this court's opinion in *Named Individual Members of the San Antonio Conservation Society v. The Texas Highway Commission*, supra, wherein we stated that the decision of local officials was not determinative of whether federal funds would be used to build highways through parks of local significance.

from a public park, recreation area, wildlife and waterfowl refuge or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use." Pub.L. 89-670, § 4, Oct. 15, 1966, 80 Stat. 933 (Emphasis added).

The Federal-Aid Highway Act of 1968, § 18(a), (b) amended § 4(f)[14] by narrowing the applicability of that section to *"publicly owned"* land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance. The statute, however, was not narrowed with respect to the ownership of land from historic sites, and the use of *"any land"* from an historic site for a highway project irrespective of ownership continues to fall within the ambit of § 4(f). See note 11, *supra*. Hence, after the 1968 amendment the duty of the Secretary was restricted with respect to parks, recreation areas, and wildlife and waterfowl refuges. *Wildlife Preserves, Inc. v. Volpe,* 3 Cir. 1971, 443 F.2d 1273, 1274-75. Section 4(f) as amended is applicable only if two conditions are satisfied by the land in question: first, except for land from an historic site, the land to be used by a project must be publicly owned, and second, the land must be from one of the enumerated types of publicly owned land, *i. e.*, a public park, recreational area, or wildlife and waterfowl refuge. See *Id.* at 1274-75; *Citizens Environmental Council v. Volpe,* D.Kan. 1972, 364 F.Supp. 286, 295, aff'd 10 Cir. 1973, 484 F.2d 870, cert. denied

14. The Federal-Aid Highway Act of 1968, Pub.L. 90-495, § 18, Aug. 23, 1968, 82 Stat. 824, also amended § 4(f) by adding a declaration of policy, and by narrowing the statute to encompass only certain types of lands which are determined to be of "national, State, or local significance." Title 49, U.S.C., Section 1653(f). See note 11 *supra* and accompanying text.

1974, 416 U.S. 936, 94 S.Ct. 1935, 40 L.Ed.2d 286; *Daly v. Volpe,* D.Wash.1972, 350 F.Supp. 252, 256, aff'd 9 Cir. 1974, 514 F.2d 1106. None of the land in question satisfied *both* of these conditions at the time of trial.

The Section 16 land held in trust by the State of Mississippi although publicly owned has never been designated or administered, formally or informally, as a wildlife refuge, or for any of the other purposes enumerated in § 4(f). The land acquired by the Nature Conservancy in 1974, although held for future use as a wildlife refuge, was not publicly owned, at the time the right-of-way for the project was acquired, nor at the time approval of plans, specifications and estimates was given, the construction contracts were awarded, and construction on the highway was begun. The letter of August 2, 1974, from the Director of the Fish and Wildlife Service to the Conservancy only proposed that the latter purchase and hold lands in Jackson County for possible future transfer to the service, if Congressional funding was obtained. Only if and when this future transfer occurred, and only after the Fish and Wildlife Service declared the land to be a wildlife refuge through publication in the Federal Register would the land have satisfied both conditions to the applicability of § 4(f).[15] The subsequent transfer on Novem-

15. The August 2, 1974, letter did not contractually bind the Fish and Wildlife Service to purchase the land from the Conservancy. That letter specifically stated that acquisition by the Service was contingent upon Congressional funding, and that if such funding was not forthcoming within a reasonable time the Conservancy could "take such action as is necessary to recover its investment, including placing the property for sale on the open market if no conservation purchaser could be found". Further, the Department of Interior, contrary to assertions of the appellants, viewed that letter as no more than a request that the Conservancy acquire the land and that it did not vest in the Department an enforceable property right in the lands so acquired. Curtis Bohlen, the Deputy Assistant Secretary for Fish, Wildlife and Parks of the Department of Interior stated in a deposition filed in the district court that the Department was only "morally obligated" and not "legally obligated" to purchase the land from the Conservancy.

ber 25, 1975, of title to 1,708 acres of this land to the Service by the Conservancy occurred after construction on the highway had begun, and could not of course make § 4(f) applicable after the fact.

In summary, we hold that the district court did not err in finding that the 5.7 mile section of I-10 will not use any "publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge" in Jackson County, Mississippi. Therefore, the Secretary of Transportation was not required, prior to approving the project, to find that there was no feasible and prudent alternative to the use of the land in question and that the program included all possible planning to minimize harm to the sanctuary of the Mississippi Sandhill Crane. Further, since no § 4(f) lands were used by the project the Secretary was not required to reach his own judgment with respect to the "national, State, or local significance" of the lands traversed by the highway.

SECTION 7 OF THE ENDANGERED SPECIES ACT OF 1973

Section 7 of the Endangered Species Act of 1973 imposes on Federal agencies the duty to "insure that actions authorized, funded, or carried out" by them do not jeopardize the continued existence of any endangered species or result in the destruction or modification of habitat of such species which the Secretary of Interior determines to be critical.[16] Hence, § 7 imposes on federal agencies

16. Section 7 of the Endangered Species Act of 1973, Title 16, U.S.C., Section 1536 provides in full:

> "The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal departments and

(Continued on following page)

the mandatory duty to insure that their actions will not either (i) jeopardize the existence of an endangered species, or (ii) destroy or modify critical habitat of an endangered species.[17] The primary responsibility for implementing § 7 is on the Secretary of Interior. Federal agencies are required to consult and obtain the assistance of the Secretary before taking any actions which may affect endangered species or critical habitat. However, once an agency has had meaningful consultation with the Secretary of Interior concerning actions which may affect an endangered species the final decision of whether or not to proceed with the action lies with the agency itself. Section 7 does not give the Department of Interior a veto over the actions of other federal agencies, provided that the required consultation has occurred. It follows that after consulting with the Secretary the federal agency involved must determine whether it has taken all necessary action to insure that its actions will not jeopardize the continued existence of an endangered species or destroy or modify habitat critical to the existence of the

Footnote continued—

> agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical."

17. The House Report on the Act emphasizes the mandatory nature of the duty imposed on federal agencies:

> "This subsection . . . requires that agencies take the necessary action that will not jeopardize the continued existence of endangered species or result in the destruction of critical habitat of those species." H.Rep. No.93-412, 94rd Cong., 1st Sess.

species.[18] Once that decision is made it is then subject to judicial review to ascertain whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe, supra,* 401 U.S. at 416, 91 S.Ct. at 824, 28 L.Ed.2d at 153. See Title 16, U.S.C., Section 1540(g).

In the present case the appellants have the burden of proving that the appellees have failed to take the "action necessary to insure" that the 5.7 mile segment of I-10 does not jeopardize the continued existence of the Mississippi Sandhill Crane or will not destroy or modify habitat determined by the Department of Interior to be critical to the cranes' existence. The court below held that the appellants had failed to meet this burden because the evidence showed that "the defendants have adequately considered the effects of this project on the Crane". *National Wildlife Federation v. Coleman, supra,* 400 F.Supp. at 712. Further, the district court found that the FEIS and other documents from the administrative records of the appellees which tended to show that I-10 may be a threat to the continued existence of the cranes "merely reflect opinions of the effect of the highway on the Crane without specifying facts upon which they are based". *Id.* at 711. With respect to the appellants' allegation that private development accompanying the construction of I-10 will jeopardize the existence of the cranes and result in the destruction of critical habitat, the district court

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18. See remarks of Senator Tunney, floor manager of the bill in the U.S. Senate:

> "So, as I read the langage [of § 7], there has to be consultation. However, the Bureau of Public Roads or any other agency would have the final decision as to whether such a road should be built. That is my interpretation of the legislation at any rate." 119 Cong.Rec., S. 14536 (July 24, 1973).

found that "the record . . . is totally devoid of any statement or opinion rising above mere speculation to indicate that such development will occur or is even likely to occur". *Id.* at 712.

The evidence to which the district court attached particular significance was the testimony of appellants' witness Jacob Valentine, the author of the 1963 report on the crane, *supra,* and the country's foremost expert on the crane. On direct examination, Valentine testified that every acre of habitat is vital to the cranes' existence, and that the construction of I-10 as planned will put the existence of the cranes in jeopardy. The construction of the highway will in Valentine's opinion result in the *direct* loss of approximately 300 acres of habitat taken as right-of-way. The direct loss of this 300 acres according to Valentine would not deny the cranes space for normal growth, movements, or territorial behavior. But Valentine continued that additional loss of habitat would result from the physical presence of borrow pits, and by the resultant drainage of wetlands caused by the excavation of borrow pits. He expressed concern also about the loss of habitat resulting from noise, vibratory disturbance, and pollution from highway construction and traffic, although no tests had been conducted to determine their effect on the cranes. Valentine testified that his views had changed since 1963, and that the main effect of the highway so far as the crane is concerned is the stimulation of private development which will be induced by the construction of this segment of I-10. Valentine testified in this regard that the single most destructive aspect of the highway to the Crane and its habitat was the proposed interchange at the Earl Bond Road, which would generate development in the cranes' habitat. Concerning his conclusion in the 1963 report that timber management was the most im-

minent threat to the Crane, Valentine testified that headway has been made in reaching an agreement on a habitat management plan with paper companies operating in the area. In addition, Valentine stated that he now believes that the crane could withstand the dangers of timber management if I-10 were not constructed. Most important to the survival of the crane in Valentine's opinion would be the creation of a refuge in Jackson County. He testified also that the FHWA should be required to purchase land to replace habitat taken by the highway. Finally, Valentine stated that in addition to the creation of a refuge the most important things to be done to save the crane from extinction are the elimination of the interchange at the Earl Bond Road and of borrow pits from sensitive crane habitat.

Valentine's concern for the effects of the highway on the crane and its habitat substantially echoed the views of the Department of Interior and the Fish and Wildlife Service as expressed in their correspondence with the FHWA and MSHD. Those agencies have since 1973 expressed opposition to the project because of the potential for adverse effects on the habitat of the crane. Further, the modifications in the project recommended by Valentine are identical to those items which the Interior Department found to warrant "major consideration". The extent of the Department of Interior's concern for the effects of the project on the crane is evidenced by its "Emergency Determination of Critical Habitat for the Mississippi Sandhill Crane", note 9, *supra*, and accompanying text. The express justification for this emergency was the construction of this segment of I-10 which threatened "the well-being of the crane". 40 Fed.Reg. at 27502.

In holding that the appellees have "adequately considered" the effects of the highway on the crane, the district

court misconstrued the directive of § 7. As we have pointed out § 7 imposes on all federal agencies the mandatory obligation to insure that any action authorized, funded, or carried out by them does not jeopardize the existence of an endangered species or destroy critical habitat of such species. See text accompanying note 16 *supra*. Although the FEIS and the administrative record indicates that the appellees have recognized and considered the danger the highway poses to the crane, they have failed to take the necessary steps "to insure" that the highway will not jeopardize the crane or modify its habitat.

The district court placed undue emphasis on Valentine's estimate of the direct loss of only 300 acres of habitat taken by highway right-of-way. All of the evidence indicates that the 5.7 mile segment of I-10 will undoubtably affect the crane and its habitat in addition to the mere taking of 300 acres of right-of-way. The relevant consideration is the total impact of the highway on the crane. As the D.C. Circuit has noted, "a far more subtle calculation than merely totaling the number of acres to be asphalted" is required where the environmental impact of a project is at issue. *D. C. Federation of Civic Associations v. Volpe*, 1972, 148 U.S.App.D.C. 207, 459 F.2d 1231, 1239. *Cf. Brooks v. Volpe*, 9 Cir. 1972, 460 F.2d 1193, 1194. Although it is clear that the crane can survive the direct loss of 300 acres of habitat, the evidence, including the FEIS, shows that it is questionable whether the crane can survive the additional loss of habitat caused by the indirect effects of the highway, coupled with the excavation of and drainage caused by borrow pits.

Principal among the indirect effects of the highway on the crane is the residential and commercial development that can be expected to result from the construction of the highway. The district court found that the record

contained no statement or opinion rising above "mere speculation" to indicate that such development is likely to occur. We disagree. In addition to the testimony of Valentine and the letters from the Department of Interior and the Fish and Wildlife Service, the FEIS acknowledges in three places that private development always accompanies the construction of a major highway and that this development is the primary effect of I-10 on the crane. FEIS, *supra*. Further, the Department of Housing and Urban Development in a letter to the MSHD commenting on the FEIS stated that construction of this segment of I-10 "will bring with it a concentration of urban growth around interchanges and other selected areas". FEIS at 93. These predictions by the FHWA, the MSHD, and HUD, agencies experienced in highway and urban development, recognize that private development will accompany the construction of I-10 in Jackson County. The fact that the private development surrounding the highway and the Earl Bond Road interchange does not result from direct federal action does not lessen the appellee's duty under § 7. *Cf. City of Davis v. Coleman*, 9 Cir. 1975, 521 F.2d 661, 677; *National Forest Preservation Group v. Butz*, 9 Cir. 1973, 485 F.2d 408, 411-12. The appellees do control this development to the extent that they control the placement of the highway and interchanges.

The federal appellees contend that the decision to build the highway was made on the assumption that the Fish and Wildlife Service would acquire a refuge for the crane, and that the Gulf Regional Planning Commission had recognized certain areas for conservation in Jackson County. The FHWA believed that these measures would lessen the impact of the highway on the crane. This reliance on the proposed actions of other agencies does not satisfy the FHWA's burden of insuring that its actions

will not jeopardize the continued existence of the crane. Further, even if these actions were taken, the Department of Interior has determined that approximately 100,000 acres of habitat in Jackson County is critical within the meaning of § 7, whereas the refuge proposed by the Fish and Wildlife Service contains only 11,300 acres, note 4, *supra*, and accompanying text. The appellees argue that their concern for the crane is also demonstrated by the fact that the highway will cross the proposed refuge at its narrowest point.[19] Under § 7, however, the relevant consideration is the area determined by the Secretary of Interior as "critical habitat" for the crane, note 9, *supra*, and accompanying text. The Secretary has delineated an area of 100,000 acres in Jackson County as "critical habitat" under § 7 for the Mississippi Sandhill Crane, and the proposed segment of I-10 traverses an extensive portion of this 100,000 acres. 40 Fed.Reg. 27501-27502. The duty of the appellees is to insure that their actions will not destroy or modify this "critical habitat", and not just the area within the habitat of the crane to be set aside as a refuge.

Similarly, the fact that timber management practices have in the past destroyed habitat of the crane does not lessen the duty of the appellees to insure that the highway and the accompanying private development do not jeopardize the existence of the crane or destroy critical habitat.[20]

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19. We note in this regard that the district court erred in its finding that the "route of the highway has clearly been chosen to pass through the smallest part of the Crane's *habitat* and nesting area". *National Wildlife Federation v. Coleman, supra*, 400 F.Supp. at 712 (emphasis added). The highway will pass through the narrowest point of the proposed *refuge*.

20. The statement by the district court, 405 F.Supp. at 711, which we deem a critical finding, that Valentine "repeatedly stated that the main threats to the continued existence of the . . . Crane are poor timber management, housing and industrial develop-

(Continued on following page)

We note that the appellees' FEIS states that at "the present time the greatest threats to the existence of the Mississippi Sandhill Crane are private development and the construction of Interstate Route No. 10". FEIS at 26. Hence, irrespective of the past actions of others the appellees have a duty to insure that the highway and the development generated by it do not further threaten the crane and its habitat.

Finally, it is beyond question from the record that the excavation of borrow pits within the area determined by the Secretary of Interior to be, "critical habitat" for the crane will destroy and modify that habitat, in violation of § 7. The appellees assert that the FEIS recognized the potential danger of borrow pits to the habitat of the crane, and that the contract plans and specifications for the highway prohibit the forming of borrow pits from any land under option by the Nature Conservancy and in Sections 15 and 16, Township 7 South, Range 7 West. FEIS at 31. The prohibition of borrow pits in these areas, however, does not satisfy the directive of § 7, since it does not prohibit the excavation of borrow pits in the entire 100,000 acres of habitat determined to be "critical" by the Secretary.

Footnote continued—

ment . . ., and I-10, in that order" is not borne out by the record. Valentine testified that timber management has been a major danger to the crane, and that in 1963 he considered it the most important potential danger to the crane. Record at 44-45. Further, while at the time of trial Valentine was of the opinion that timberlands within the habitat of the crane were not being properly managed, he further testified that certain actions had been taken by the paper companies to safeguard the habitat of the crane, and that consultations between the Fish and Wildlife Service and the paper companies were continuing. Record at 87-89.

RELIEF

The appellants do not seek a permanent injunction against the construction of the highway. Rather they seek only that an injunction issue until such changes are made in the project as will enable the Secretary of the Department of Interior to conclude that the project will not jeopardize the continued existence of the Mississippi Sandhill Crane, or destroy or modify critical habitat of the crane. The modifications in the project which the appellants contend will bring the highway into compliance with § 7 are: (i) the elimination of the Earl Bond Road interchange, (ii) the elimination of borrow pits in the area determined to be critical habitat, and (iii) the acquisition of land by the FHWA to mitigate the loss of critical habitat taken by the highway.

Because the Department of Interior has primary jurisdiction for administering the Endangered Species Act, and the subject matter of this lawsuit is within the specialized field of the Department we defer to its determination of what modifications are necessary to bring the highway project into compliance with § 7. Therefore, we direct the district court on remand to enter its injunctive order restraining and enjoining the appellees as follows:

> (a) From initiating or carrying out any further work or incurring any further contractual obligations with respect to the interchange at the Earl-Bond Road;
>
> (b) From excavating any borrow pits in the area determined to be critical habitat for the Mississippi Sandhill Crane under the notice published on June 30, 1975, at 40 Fed.Reg. 27501-27502.

This injunction is to remain in force until the Secretary of the Department of Interior determines that the necessary modifications are made in the highway project to insure that it will no longer jeopardize the continued existence of the Mississippi Sandhill Crane or destroy or modify critical habitat of the Mississippi Sandhill Crane.[21] We do not reach a decision as to whether the FHWA can be ordered to acquire land to replace that taken by the Highway project, since we are confident that the Secretary of Transportation and the Secretary of Interior will take all actions necessary on remand to protect the continued existence of the Mississippi Sandhill Crane and its habitat.

Reversed and remanded with directions.

See Appendix A on next page.

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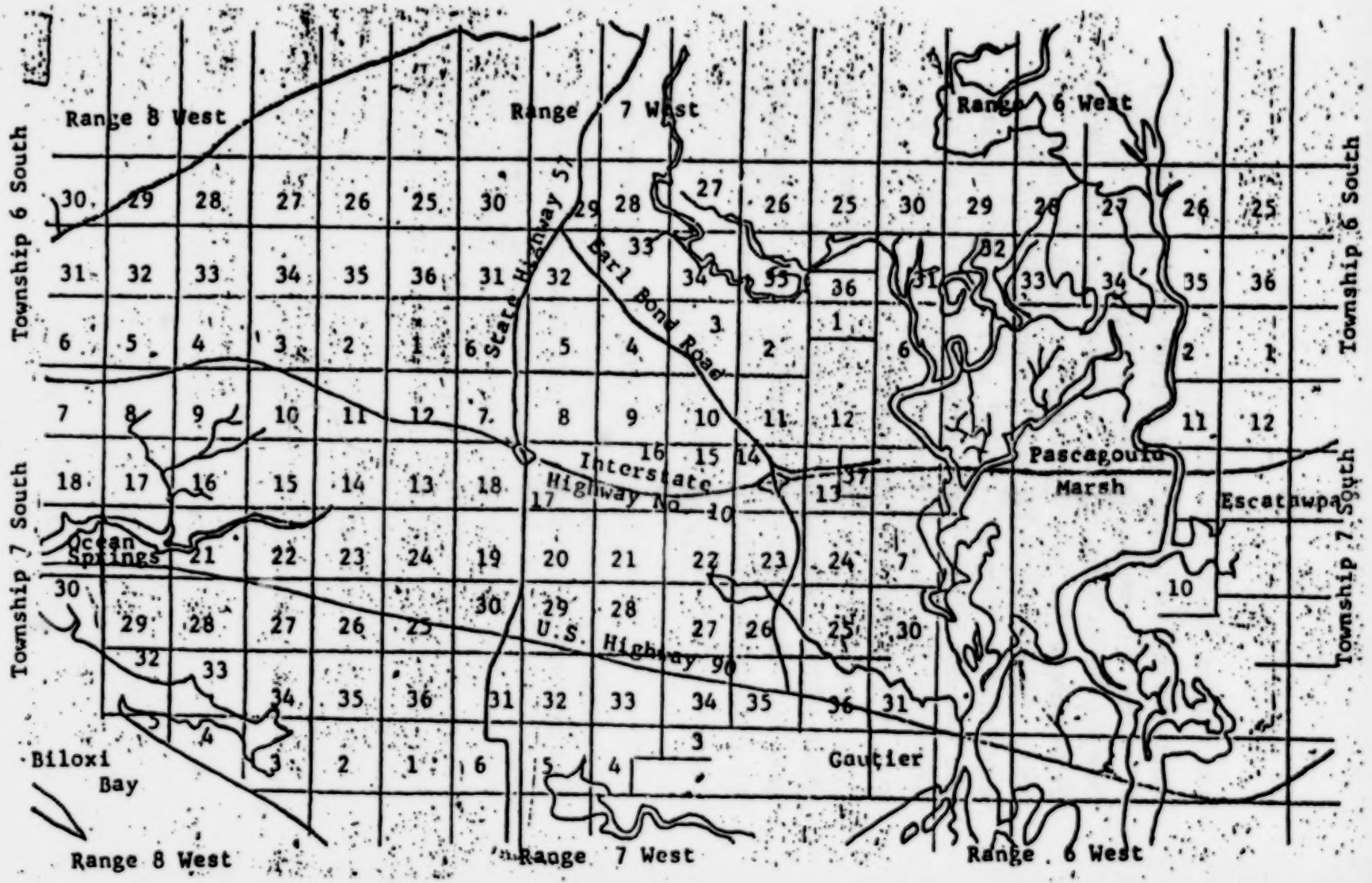
21. The complaint filed by the appellants in the district court did not allege that the State appellee had violated § 7. Hence, the State appellee contends that the ruling of the district court cannot be overturned insofar as it concerns the State appellee. The State of Mississippi, however, voluntarily sought federal funding for this project, and thereby submitted itself to federal law, including § 7 of the Endangered Species Act. See *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept., supra*, at 1027-28.

APPENDIX A



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APPENDIX "B"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NIXON, District Judge.

The Plaintiffs in this action brought suit under Section 4(f) of the Department of Transportation Act (49 U.S.C. § 1653(f)) and Section 7 of the Endangered Species Act (16 U.S.C. § 1536), seeking to halt the construction of a segment of Interstate Highway Route 10 (I-10) through the habitat of the Mississippi Sandhill Crane in Jackson County, Mississippi. A full hearing on the merits was combined with a hearing on the Plaintiffs' Request for a Preliminary Injunction. Based upon all of the evidence adduced at this bench trial, this Court makes the following Findings of Fact and reaches the following Conclusions of Law as required by Rule 52, F.R.Civ.P.

FINDINGS OF FACT

I-10 is a route designated by Congress as a part of the National System of Interstate and Defense Highways, connecting Jacksonville, Florida, on the east through designated intermediate control points, with Los Angeles, California on the west. In Mississippi, I-10 will be 77.1 miles long. As of now, I-10 has been substantially completed from the Mississippi-Louisiana line, through Hancock and Harrison Counties, to a point in Jackson County, Mississippi where it intersects with State Highway 57. From the intersection with Highway 57, I-10 will extend in an easterly direction approximately 18.9 miles to the Alabama line. The controversy in this suit relates to a portion of I-10 which is approximately 5.7 miles in length, extending

in an easterly direction from its intersection with Highway 57 to the west bank of the Pascagoula River.

I-10 is being constructed by the Mississippi Highway Department, with Federal funding of 90% of the cost incurred, under the provisions of the Federal-Aid Highway Act, as amended, Title 23, United States Code.

The Mississippi Sandhill Crane, *Grus canadensis pulla*, was listed as an endangered sub-species on June 4, 1973, at 38 Fed.Reg. 14678, pursuant to Section 3 of the Endangered Species Act of 1969, P.L. 91-135, Dec. 5, 1969 (former Section 668cc-3, Title 16, United States Code), now repealed and replaced by the Endangered Species Act of 1973, P.L. 93-205, Dec. 28, 1973, 87 Stat. 884. There remain in existence approximately forty Mississippi Sandhill Cranes. The sole habitat of this endangered species is an area of some 40,000 acres in Jackson County, Mississippi, generally bounded on the west by the Harrison County line, on the north by an east-west line running a short distance north of the Vancleave community, on the east by the Pascagoula River, and on the south by the Mississippi Sound or Gulf of Mexico. I-10 has already been constructed in a west-east direction slightly more than halfway through the aforesaid crane habitat to its intersection with Highway 57.

A Mississippi Sandhill Crane refuge in Jackson County, consisting of two separate units, has been proposed by the U.S. Fish and Wildlife Service. A part of this proposed refuge has already been acquired by the Nature Conservancy, a private organization, under an agreement whereby the Service will reimburse the Conservancy when and if it receives sufficient appropriations from Congress. The western unit (Ocean Springs) of the refuge abuts the section of I-10 which is soon to be completed to its intersection with Highway 57. The portion

of I-10 which is the subject of this suit runs directly through the habitat of the Crane and will bisect the eastern unit (Fountainbleu) of the proposed refuge. The alignment of this project traverses Sixteenth Section land presently held by the Jackson County School District and also cuts through Fifteenth Section land held by the Nature Conservancy for the proposed refuge.

This segment of I-10 has been under consideration since 1963. At the time that this action was instituted, all of the right-of-way for I-10 between State Highway 57 and the Pascagoula River had been acquired, with most of it having been purchased prior to 1970.

A draft environmental impact statement was approved by the Federal Highway Administration and circulated on October 29, 1974. A final environmental impact statement was approved by the Federal Highway Administration on March 10, 1975, and submitted to the Council on Environmental Quality on March 13, 1975. On March 21, 1975, the Plaintiff, National Wildlife Federation, through its counsel, wrote the defendant, Tiemann, the Federal Highway Administrator, expressing opposition to the project because of alleged violations of Section 7 of the Endangered Species Act and Section 4(f) of the Department of Transportation Act. A copy of that letter was sent to the Department of Interior's Director of Fish and Wildlife Service, its Solicitor's Office, and the Department's Office of Environmental Affairs.

On April 30, 1975, approval of plans, specifications and estimates for the 5.7 miles of the project was given by the defendant, Shaw, pursuant to 23 U.S.C. § 106(a), which constituted a final action by the Federal Highway Administration obligating the United States to participate in the cost of the project.

On May 23, 1975, plaintiffs filed this suit.

A contract was let by the Mississippi Highway Department for the construction of this segment of highway on May 27, 1975, subject to the approval of the award by the Federal defendants. Submission of the contract to the Federal defendants for their approval and action has been temporarily suspended pending the trial of and decision in this action.

On June 25, 1975, the eve of the trial of this action, the Department of Interior made an emergency determination that the Mississippi Sandhill Crane's habitat traversed by this highway project is "critical" under Section 7 of the Endangered Species Act, and was about to be so designated in the *Federal Register*. On June 30, 1975, this designation was in fact published at 40 Fed.Reg. 27501.

CONCLUSIONS OF LAW

A. JURISDICTION

Plaintiffs allege that this Court has jurisdiction of this controversy under Section 4(f) of the Department of Transportation Act[1] and Section 7 of the Endangered Spe-

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1. "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public parks and recreation lands, wildlife and water fowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the land traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and water fowl refuge of national, State or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and water fowl refuge, or historic site resulting from such use." 49 U.S.C. § 1653(f).

cies Act.[2] We first consider whether Section 4(f) of the Department of Transportation Act has any applicability to the present controversy. In making this determination the key issue which the Court must consider is whether this project "requires the use of any publicly owned land from a public park, recreation area, or wildlife and water fowl refuge of National, State or local significance".

The plaintiffs urge that Section 4(f) does apply, since a portion of the project in question traverses Sixteenth Section land, which is owned by the Jackson County School District, thereby making the land "public land", and because the entire project will cross land which is being used as a "de facto" refuge by the Cranes and which is proposed as an official refuge therefor. The Court finds this contention unconvincing. I-10 simply will not use any "publicly owned land from a public park, recreation area, or wildlife and water fowl refuge of national, State or local significance" in Jackson County, Mississippi.

In *Pennsylvania Environmental Council, Inc. v. Bartlett,* the plaintiffs brought suit to enjoin the planned relocation of a highway and to prevent the use of Federal funds for the project. A portion of the proposed project paralleled and traversed an area of the Susquehanna River watershed used as a recreation area by sports fishermen. The relocated route lay entirely within land owned by the Pennsylvania Department of Forest and Waters and the

2. ". . . all other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary [of Interior], utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitats of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical." 16 U.S.C. § 1536.

general state authority of the Commonwealth of Pennsylvania. In response to an inquiry of the Pennsylvania Highway Department, the Deputy Attorney General of Pennsylvania ruled "The fact that said lands remain State forest lands and have not been set aside for park, wildlife interests or recreation and may be sold when they have a more valuable use for another purpose clearly removes such lands from the purview of the aforementioned Federal Statutes. [Section 4(f) and other statutes not pertinent here.]" The Third Circuit ruled that the fact that the appropriate state official had determined the lands in question not to be covered by Section 4(f) was determinative. "Under [Section 4(f) of the Department of Transportation Act] whether public land is also a park recreation area or wildlife reserve is to be determined by the appropriate federal, state or local officials having jurisdiction thereof." *Pennsylvania Environmental Council, Inc. v. Bartlett,* 454 F.2d 613, 623 (3rd Cir. 1971). See also *Citizens Environmental Council v. Volpe,* 484 F.2d 870 (8th Cir. 1973), *cert. den.* 416 U.S. 936, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974); *Daly v. Volpe,* 350 F.Supp. 252 (D.Wash.1972).

In this case the office of the Attorney General of the State of Mississippi has determined that the lands in question are not "publicly owned lands from a public park, recreation area, or wildlife and water fowl refuge" within the meaning of Section 4(f) of the Department of Transportation Act. (See State defendant's Findings of Fact and Conclusions of Law, pp. 11-18). This determination having been made, the Secretary of Transportation is bound by it and may not seek to apply Section 4(f). See *Pennsylvania Environmental Council v. Bartlett, supra.* Therefore, Section 4(f) of the Department of Transportation Act provides no jurisdictional basis for this suit.

The Court reaches a different result, however, in its consideration of Section 7 of the Endangered Species Act

(16 U.S.C. § 1536). This section mandates that all Federal agencies shall use their authority to assure that actions taken by them "do not jeopardize the continued existence of . . . endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary [of Interior] . . . to be critical." (16 U.S.C. § 1536). Another section of the Act, 16 U.S.C. § 1540(g), authorizes any person to commence a civil suit on his own behalf to compel compliance with the provisions of the Act. The section further provides that "[t]he district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, as the case may be."

Section 1540(g) requires, however, that before any suit is commenced, sixty days written notice of the alleged violation must be given to the Secretary of the Interior. The Federal defendants allege that the plaintiffs have failed to provide the Secretary with the required notice. This Court finds otherwise.

On March 21, 1975, the plaintiff, National Wildlife Federation, wrote to the defendant, Tiemann, expressing its opposition to the project and alleging violations of both Section 7 of the Endangered Species Act and Section 4(f) of the Department of Transportation Act. (Exhibit FD-1 (39)) Copies of that letter were sent to three different offices within the Department of the Interior. It is true, as the Federal defendants argue, that this letter does not specifically purport to be the notice required by 16 U.S.C. § 1540(g), but this section does not require the notice to be in any particular form. The Court is convinced that the letter of March 21 was sufficient to place the Secretary of Interior on notice of the alleged violations of Section 7.

The Federal defendants further contend that Section 7 is not applicable because the Secretary of the Interior has not properly determined the area in question to be "critical habitat" of the Crane, that is, that the "Emergency Determination of Critical Habitat for the Mississippi Sandhill Crane" was not made in compliance with the Secretary's own rules and regulations. Subsequent to the trial of this matter the Secretary did cause this determination to be properly published in the *Federal Register*, and the emergency determination has not been shown to be in derogation of the Secretary's regulations. In a matter of this nature, where time is of the essence, a decision on the merits should not be delayed because of a possibility that the Secretary has committed a technical violation of his own regulations, which are admittedly still in the formative stage.

For the above reasons the Court finds that it does have jurisdiction of this cause under Section 7 of the Endangered Species Act.

B. STANDING

The Endangered Species Act at 16 U.S.C. § 1540(g) confers automatic standing on any person claiming a violation thereof. The Secretary of the Interior and the alleged violator must be given notice sixty days before suit is filed (16 U.S.C. § 1540(g)(2)(A)), but as was pointed out above, the plaintiff's March 21, 1975 letter to the defendant, Tiemann, with copies to three offices in the Department of the Interior, met this notice requirement. Thus, plaintiffs clearly have standing under the "citizens suit" provision of the Endangered Species Act.

In addition, plaintiffs are persons "aggrieved" under Section 10 of the Administrative Procedure Act (5 U.S.C. § 702) because of alleged violations of Section 7 of the

Endangered Species Act (16 U.S.C. § 1536). Both plaintiff organizations allege "injury in fact" to their members, and, as visitors and users of the Mississippi Sandhill Crane habitat, are within the "zone of interest" intended to be protected by the statute. Having alleged such injuries, the plaintiff organizations clearly have standing to bring this action. See *United States v. SCRAP*, 412 U.S. 669, 689-90, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *cf., Sierra Club v. Morton*, 405 U.S. 727, 734-35, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972).

C. LACHES

The defendants claim that plaintiffs may not now assert their present claims, but as a matter of equity, are barred by the doctrine of laches. The Fifth Circuit has only recently dealt with the laches issue in *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860 (5th Cir., 1975), in which the Court pointed out that "[t]here are three independent criteria which must be met before the equitable doctrine of laches can be applied, the defendant must show a delay in asserting a right or claim, the delay was not excusable and there was undue prejudice to the party against whom the claim is asserted." (Citation omitted). *Ecology Center of Louisiana, Inc. v. Coleman, supra.* There has been no showing that the plaintiffs in this case were guilty of any undue delay in asserting their rights or claims herein. Final approval of "plans, specifications and estimates" for the project in question was given on April 30, 1975 by the defendant, Shaw. This was the critical Federal action committing the Federal government to participate in the project. *See, e. g. Steubing v. Brinegar*, 375 F.Supp. 1158, 1162 (W.D.N.Y.1974). Since the plaintiffs filed this suit only three weeks after the formal Federal commitment to the project, they certainly are not guilty of laches.

D. MERITS OF THE CONTROVERSY

Having considered the threshold issues of jurisdiction and standing and the affirmative defense of laches raised by the defendants, we now reach the merits of the controversy. At the outset, the Court notes that the plaintiffs bear the burden of establishing the illegality of the defendants' actions. *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F.2d 613, 619 (3rd Cir. 1971); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316 (3rd Cir. 1968), *cert. den.* 394 U.S. 929, 89 S.Ct. 1187, 22 L.Ed.2d 455 (1969). In order to prevail in this action, the plaintiffs must show that the I-10 project in question will jeopardize the continued existence of the Mississippi Sandhill Crane or result in the destruction or modification of its habitat. The plaintiffs had failed to meet this burden.

The Court is aware that the record in this case includes a number of letters which allege that the I-10 project in question will adversely affect the Crane. Indeed, the environmental impact statement prepared by the defendants, which is an exhibit in this case, admits that I-10 may be a threat to its existence. For the most part, however, these documents merely reflect opinions of the effect of the highway on the Crane without specifying facts upon which they are based. Furthermore, most in all candor admit that the opinions expressed are merely speculation.

The evidence which the Court finds persuasive is the testimony given at the trial of this cause by the plaintiffs' own expert witness, Jacob M. Valentine, Jr., biologist with the U. S. Fish and Wildlife Service, who was acknowledged by all parties to be this country's foremost expert on the Mississippi Sandhill Crane. It was Mr. Valentine who in September, 1963, admittedly with only a brief experience in studying the Cranes, reported to the Mississippi Game and Fish Commission that the major problems

confronting the Crane at that time were drainage and poor timber management practices,[3] and that the Crane could tolerate the loss of habitat and disturbance from the I-10 highway alignment. His report further pointed out "there are some advantages to the interstate highways in that they effectively block cross traffic through remote areas such as this. The right-of-ways are fenced eliminating general trespass. The highways, especially if provided with rest stops, would provide opportunity for the bird-watching, nature-loving public to view the rare birds and the flora." (Exhibit FD-1(1)).

The testimony of Mr. Valentine at the hearing of this matter was extensive, consuming some eighty-seven pages of the transcript. Throughout his testimony, Valentine repeatedly stated that the main threats to the continued existence of the Mississippi Sandhill Crane are poor timber management, housing and industrial development of the area comprising its habitat, and I-10, in that order. (Transcript, pages 44-45, 82).

Mr. Valentine's testimony clearly indicates that the Mississippi Sandhil Crane can tolerate the direct effects of I-10. He admits that the project will take only approximately 300 acres of the 10,000 acres comprising the habitat of the Crane (Transcript, p. 56), and that the remaining acreage of habitat will be adequate to allow space for its normal growth, movement and territorial behavior, to meet its nutritional requirements, and to preserve adequate breeding sites, cover and shelter for the present bird population.

When asked about the sensitivity of the Sandhill Crane to disturbance, Mr. Valentine admitted that he had con-

3. St. Regis Paper Co. has promised future cooperation with the Fish and Wildlife Service by instituting timber management practices in the area to improve the Cranes' habitat.

ducted no experiments to make this determination. He was of the opinion, however, that the bird preferred isolation and that the noise and continuous traffic on the highway would cause them to flush from their nests, possibly endangering eggs in the nest. He admitted, however, that a primary method which he uses in estimating the population of the birds is flying over nests in helicopters and airplanes, causing the birds to flush from their nests. His testimony showed no concern that this flushing endangers eggs in the nest. (Transcript, pp. 77-79).

Considered as a whole, the essence of Mr. Valentine's testimony is that the only real danger presented to the Sandhill Crane by I-10 is private development which may accompany or occur in the area of the highway. But the record in this case is totally devoid of any statement or opinion rising above mere speculation to indicate that such development will occur or is even likely to occur. This is particularly true with respect to the interchange at the intersection of I-10 and Earl Bond Road, about which the plaintiffs specifically complain. The land surrounding the proposed project is depicted to this Court as low lying, marshy land totally unsuited for commercial development. In addition, the record contains several references to a program under which the Nature Conservancy is engaged in purchasing and holding land within the Crane's habitat, hopefully for the future establishment of a Mississippi Sandhill Crane refuge. This program is providing and will continue to provide a further buffer for the crane against private development. In its notice of intention to determine "critical habitat" for 108 endangered species, including the Mississippi Sandhill Crane, published in the *Federal Register* on May 16, 1975, the U. S. Fish and Wildlife Service noted, "There may be many kinds of actions which can be carried out within the 'critical habitat' of a species that would not . . . adversely affect that species" and are there-

fore not inconsistent with Section 7. (40 *Fed.Reg.* 21499). The evidence clearly shows that the construction of I-10 through Jackson County, Mississippi falls within this description.

It is obvious from the record in this case that the defendants have not been callous in their planning of this project and the consideration of its impact on the Crane. The environmental impact statement prepared by the defendants devotes several pages to the Crane, the effect of the highway upon it, and steps which will be taken to lessen the impact, if any, of the highway. The route of the highway has clearly been chosen to pass through the smallest part of the Crane's habitat and nesting area. The record contains a number of references to steps which the defendants are requiring contractors on the project to take in order to lessen the impact of construction on the Cranes. It appears to the Court that the defendants have adequately considered the effects of this project on the Crane in all phases of its planning.

CONCLUSION

The Court finds that it has jurisdiction of this controversy under Section 7 of the Endangered Species Act, though not under Section 4(f) of the Department of Transportation Act. The plaintiffs have standing to bring suit under Section 7, and they have not been guilty of any laches in bringing their claim before this Court. However, the plaintiffs have failed to prove that they are entitled to any relief under the aforementioned statute. In short, based upon all of the evidence of record, there is room in the area in question for the lanes and the Cranes.

A final judgment conforming with the above Findings of Fact and Conclusions of Law, approved as to form by attorneys for both sides, shall be presented to this Court within the time and manner prescribed by the rules hereof.

APPENDIX "C"

SUPREME COURT OF THE UNITED STATES

No. A-1147

E. L. BOTELER, DIRECTOR, MISSISSIPPI STATE HIGHWAY DEPARTMENT,
Petitioner

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 9, 1976.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 1st day of July, 1976.

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3256

NATIONAL WILDLIFE FEDERATION, ET AL.,
Plaintiffs-Appellants,

versus

WILLIAM T. COLEMAN, Secretary of
Transportation, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Mississippi

(Filed July 19, 1976)

ORDER:

IT IS ORDERED that the motion of appellee, E. L. Boteler, Director, Mississippi State Highway Department, for a further stay of the mandate pending the timely filing of the petition for writ of certiorari in the Supreme Court of the United States, is hereby granted; issuance of the mandate and this Court is ordered stayed until September 9, 1976.

/s/ Bryan Simpson
United States Circuit Judge

APPENDIX "E"

We submit that this Court has unintentionally given the Secretary of the Interior a veto power in this case by making the injunction continue until he has "determine[d] that all necessary modifications are made in the highway project" to comply with Section 7. We submitted that the appropriate relief, under the plain wording of Section 7 and of this Court's opinion, would be to remand to the district court with instructions that the injunction continue until the Secretary of Transportation has determined, after meaningful consultation with the Secretary of the Interior, any necessary modifications to insure that the highway segment will not endanger the continued existence of the Mississippi Sandhill Crane or destroy or modify critical habitat of this species. We are authorized to state that the Secretary of the Interior agrees that the relief we have suggested is the appropriate relief under Section 7.

Supreme Court, U. S.
FILED
OCT 7
MICHAEL RODAK, JR., CLERK

No. 76-351

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

E. L. BOTELER, DIRECTOR, MISSISSIPPI STATE HIGHWAY DEPARTMENT

v.

NATIONAL WILDLIFE FEDERATION AND MISSISSIPPI WILDLIFE FEDERATION; WILLIAM T. COLEMAN, SECRETARY OF TRANSPORTATION; NORBERT T. TIEMANN, FEDERAL HIGHWAY ADMINISTRATOR; AND EMERY L. SHAW, FEDERAL HIGHWAY ADMINISTRATION DIVISION ENGINEER

BRIEF FOR NON-FEDERAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-351

E. L. BOTELER, DIRECTOR, MISSISSIPPI STATE HIGHWAY DEPARTMENT

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

BRIEF FOR NON-FEDERAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

COUNTER-STATEMENT OF THE CASE

In May, 1975 the Federal Highway Administration and the Mississippi State Highway Department were ready to begin construction on a 5.7 mile section of Interstate Highway 10 in Jackson County, Mississippi which would bisect the last remaining habitat for the Mississippi Sandhill Crane, an endangered sub-species numbering less than 40 birds. (A. 4, 13-14).[1] The U.S. Department of Interior, which administers the Endangered Species Act (16 U.S.C. § 1531 *et seq*), had in writing several times

[1] References are to the Appendices in Petitioner's brief. A. 1-33 is the opinion of the Court of Appeals, reported officially as *National Wildlife Federation, et al.* v. *Coleman, et al*, 529 F.2d 359.

protested that the highway construction would violate Section 7 of that statute requiring federal agencies "to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence of such endangered species * * * or result in the destruction or modification of [critical] habitat of such species." (A. 12-14).[2]

On May 23, 1975, a few weeks after final Federal Highway Administration approval of highway construction plans, the National Wildlife Federation with its state affiliate, the Mississippi Wildlife Federation, brought suit (a) to enjoin the most damaging aspects of the construction—an interchange which threatened the crane's habitat with induced development, and "borrow" (excavation) pits which would drain the land—and (b) to compel public acquisition of crane-habitat land in order to mitigate the loss of habitat which would be taken, directly and indirectly, by the highway. (A. 14, 31; Pet. Br. 6).

On June 25, 1975, the day before trial on the merits of this case, the Department of Interior issue an *emergency determination* that 100,000 acres of land in Jackson County, Mississippi, including that portion of the County in which the highway would be built, was habitat critical to the survival of the Crane. (A. 14-15).

At trial the only substantive witness was the country's leading expert on the Mississippi Sandhill Crane, Jacob Valentine, a biologist with the U.S. Fish and Wildlife Service. (A. 25). He testified, for respondents, *inter alia* that—

- "every acre of habitat is vital to the cranes' existence, and that the construction of I-10 as planned will put the existence of the cranes in jeopardy";
- "the main effect of the highway so far as the crane is concerned is the stimulation of private development which will be induced by the construction of this segment of I-10";
- "the single most destructive aspect of the highway to the Crane and its habitat was the proposed interchange at Earl Bond Road, which would generate development in the cranes' habitat";
- "the most important things to be done to save the crane from extinction [in addition to the creation of a wildlife refuge] are the elimination of the interchange at the Earl Bond Road and of borrow pits from sensitive crane habitat."

(A. 25-26).

[2] See Pet. Brief p. 2 for Section 7 in its entirety.

The Final Environmental Impact Statement, produced by the Federal Highway Administration in conjunction with the Mississippi State Highway Department, was introduced into evidence. It contained these concessions:

- "The indirect effects of highway development, specifically the effects of residential and commercial development, are known, however. The crane cannot survive in built-up areas, and a certain amount of private development will always accompany construction of a major highway facility. This new development within the crane's habitat is the most significant effect that is to be feared."
- "At the present time, the greatest threats to the existence of the Mississippi Sandhill Crane are private development and the construction of Interstate Route No. 10."
- "It is felt that the primary effects of the highway [on the Crane] will not come from the physical existence of the facility but from the inherent development which accompanies a new highway."

(A. 9-11)

No testimony or other evidence was put forward by the federal or state defendants to controvert Mr. Valentine's

testimony or to explain away the admissions in the environmental impact statement.

Nonetheless, the District Court found that the plaintiffs had not satisfied their burden of proving a violation of the Endangered Species Act. (A. 43).[3] The Court found that the defendants "had adequately considered" the impacts on the crane (A. 46), and that the evidence of threat to the crane was too speculative to warrant a finding of violation of Section 7. (A. 43, 45).

The Fifth Circuit disagreed. On appeal it held that the Federal Highway Administration had a duty not just to "consider" the impacts of their actions on the crane, but to *insure* that those impacts did not jeopardize the existence of the crane or destroy or modify its critical habitat (A. 27). Accordingly, it reversed the District Court and remanded with instructions to issue an injunction against the building of the interchange and the digging of borrow pits in the area designated as critical habitat, until the Department of Interior was satisfied that necessary modifications in the highway project were made which would insure compliance with Section 7. (A. 32).

The State Highway Department filed its petition for a Writ of Certiorari with this Court on September 7, 1976.

ARGUMENT

I.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH REQUIRES THIS COURT'S ATTENTION

Petitioner rightly states that this Court has not previously been called on to construe Section 7 of the En-

[3] The District Court's opinion is set forth in Petitioner's Appendix B, at pages A. 34-46, and is officially reported at 400 F. Supp. 705.

dangered Species Act, and also correctly notes that the Fifth Circuit's opinion was the first appellate opinion relating to the Act. (Pet. Br. 11). This opinion was a straightforward interpretation of Section 7, and palpably correct. The evidence of a statutory violation of the clear and unequivocal mandate of Section 7—to *insure* that Federal actions do not further jeopardize an endangered species or destroy or modify the critical habitat for such a species—was monumental. The District Court's finding to the contrary was plainly erroneous. The Court of Appeals had no option but to reverse, which of course it did.

The petitioner claims that the Fifth Circuit erred in "granting the Secretary of the Interior *absolute authority* to determine what actions must be taken by the Department of Transportation to fulfill its duties and responsibilities pursuant to Section 7". (Pet. Br. 20). (*Emphasis ours*).

The Court of Appeals acknowledged that Interior did not have a "veto" over the highway. (A. 23). However, it also recognized that the Department has "primary jurisdiction" over the administration of the Endangered Species Act (A. 31), that "the subject matter * * * [was] within the specialized field of the Department" (A. 31) and that it necessarily has the expertise to determine what action needed to be taken to bring the proposed highway into harmony with the statute.[4] The Court recognized Interior's responsibility—"we defer to its determinations of what modifications are necessary" (A. 31)—to propose a final resolution to this controversy. In the context of this case, with its history of petitioner's recalcitrance and bad faith, the Fifth Circuit implicitly and quite properly placed on petitioner the burden of

[4] The Court also took note that Interior had previously, repeatedly and unavailingly protested the highway plan, particularly the interchange and the digging of the borrow pits. (A. 12-16).

challenging Interior's administrative findings (*i.e.*, should further court action be necessary, the burden of coming forward with evidence that those findings are wrong); as the Court (at A. 24) was careful to note, however, the burden of proving a statutory violation remains on the respondent.

In short, the opinion from which petitioner seeks relief was carefully reasoned, tailored to the record, correct, and as an initial judicial exposition of what Congress intended in the Endangered Species Act leaves little room for argument. It certainly raises no issue requiring this Court's further review and intervention.

II.

THERE IS NO CONFLICT BETWEEN THE FIRST AND EIGHTH CIRCUITS OVER CONSTRUCTION OF THE ENDANGERED SPECIES ACT

In *Sierra Club* v. *Froehlke*, 534 F. 2d. 1289 (1975) the Eighth Circuit affirmed a district court's finding of non-violation of Section 7. Plaintiff-appellant had challenged a Corps of Engineers dam which arguably threatened the cave habitat of some 30,000 Indiana Bats living in the Meramec River basin. That habitat had *not* been declared critical by the Department of the Interior. Some 700,000 Indiana Bats were still extant. The District Court was unpersuaded by the evidence either that bats on the Meramec would be destroyed or that, in any event, the existence of the species was threatened by this project. The Court of Appeals was unable to find "clear error". *Sierra Club* v. *Froehlke*, 534 F. 2d. at 1305. While the Department of Interior had not "acquiesced" to the building of the dam, the Eighth Circuit properly noted (at p. 1303) that its "acquiescence" was not required by Section 7.

Both the Fifth and Eighth Circuits have *explicitly* recognized that Interior holds no veto power over projects sponsored or financed by sister federal agencies. (*See* A. 23). The Fifth Circuit has, in addition, acknowledged that because of Interior's "primary responsibility for implementing Section 7" (A. 23), and where a statutory violation has been established, courts can—and, in cases such as this one, should—look to Interior's expertise in deciding what project modifications need be made to avoid a collision with the Endangered Species Act.

The decisions of the Fifth and Eighth Circuits are complementary to one another, not in conflict, and the purported need to resolve an inconsistency is illusory.

CONCLUSION

For the reasons stated, the petition by the Mississippi State Highway Department for a Writ of Certiorari should be denied.

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National Wildlife Federation

A. SPENCER GILBERT III, ESQ.

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Mississippi Wildlife Federation

October 1976